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Supreme Court of the United States

OCTOBER TERM, 1963

No. 32

THE HONORABLE JAMES B. PARSONS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 8, 1963
CERTIORARI GRANTED JANUARY 7, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 573

THE HONORABLE JAMES B. PARSONS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term 1961

No. 13701, Original

Ex Parte:

In the Matter of the

CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS—
Filed April 12, 1962

Now comes the petitioner, The Chesapeake & Ohio Railway Company, by its attorneys, Charles J. O'Laughlin, Holland C. Capper, and Thompson, Raymond, Mayer & Jenner, and respectfully moves this Court:

1. For leave to file the petition, hereto annexed, for a writ of mandamus under Section 1651 of Title 28 of the United States Code.

2. That a rule be entered and issued directing the Honorable James B. Parsons, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to show cause why a writ of mandamus should not issue against him, in accordance with the prayer of the petition, and why petitioner should not have such other and further relief as may be just and proper.

The Chesapeake & Ohio Railway Co., Petitioner,
By: Charles J. O'Laughlin, One of its Attorneys.

Holland C. Capper, Thompson, Raymond, Mayer & Jenner, 135 South LaSalle Street, Chicago 3, Illinois, Of Counsel.

[fol. 2]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term 1961

No. 13701, Original

Ex Parte:

In the Matter of the

CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner.

PETITION FOR WRIT OF MANDAMUS

To the Honorable Justices of the United States Court of Appeals for the Seventh Circuit:

1. Petitioner, The Chesapeake and Ohio Railway Company, is a corporation incorporated under the laws of the State of Virginia, and does business in other states including the State of Michigan and the State of Illinois.

2. On February 10, 1961, a complaint was filed in the Circuit Court of Cook County, Illinois against the petitioner, captioned *Jack J. Filbrun, Plaintiff* vs. *The Chesapeake and Ohio Railway Company, a corporation, Defendant*, No. 61 C 2214. A copy of this complaint is attached to this petition as Exhibit A.

3. On April 17, 1961, petitioner filed in the said action a motion with supporting affidavit to dismiss the complaint on the ground that the Circuit Court of Cook County was an inconvenient and inappropriate forum for the trial [fol. 3] of the said action. A copy of this motion with supporting affidavit is attached to this petition as Exhibit B. A copy of Filbrun's answer to said motion, with supporting affidavit, is attached to this petition as Exhibit C.

4. The case came on for hearing before the Honorable Thomas E. Kluczynski, a Judge of the Circuit Court of

Cook County, Illinois, on the motion to dismiss and the answer thereto and affidavits in support and opposition to the motion. The Honorable Thomas E. Kluczynski entered an order on May 15, 1961, dismissing the action on the ground that the Circuit Court of Cook County, Illinois was an inconvenient and inappropriate forum. A copy of this order is attached to this petition as Exhibit D.

5. On May 26, 1961, a petition with accompanying affidavit for a "Rehearing of Motion to Dismiss and Motion to Vacate Order Dismissing Cause" was duly presented by Filbrun and filed. A copy of this petition and affidavit is attached to this petition as Exhibit E.

6. On June 8, 1961, the Honorable Thomas E. Kluczynski entered an order denying Filbrun's petition for "Rehearing of Motion to Dismiss and Motion to Vacate Order Dismissing Cause." A copy of this order is attached to this petition as Exhibit F. No appeal was taken from this order.

[fol. 4] 7. On July 11, 1961, Filbrun filed an action in the United States District Court for the Northern District of Illinois, Eastern Division, captioned *Jack J. Filbrun, Plaintiffs* vs. *The Chesapeake and Ohio Railway Company, a corporation, Defendant*, No. 61 C 1174. This complaint was substantially identical to that which had been filed in the Circuit Court of Cook County and dismissed. A copy of the complaint filed in the District Court for the Northern District of Illinois is attached to this petition as Exhibit G.

8. On August 23, 1961, petitioner moved that the case captioned *Jack J. Filbrun, Plaintiff* vs. *The Chesapeake and Ohio Railway Company, a corporation, Defendant*, No. 61 C 1174, be transferred to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan. In support of its motion petitioner filed a written motion and affidavit which is attached to this petition as Exhibit H.

9. An affidavit in opposition to the motion to dismiss was duly filed by Filbrun, a copy of which is attached to this petition as Exhibit I.

10. In October, 1961, Case No. 61 C 1174 was transferred to the docket of the Honorable James B. Parsons, United States District Court, Northern District of Illinois, Eastern Division. At the request of petitioner he took the [fol. 5] motion to transfer under advisement on November 2, 1961.

11. On December 7, 1961, the Honorable James B. Parsons entered an order denying petitioner's motion to transfer. A copy of this order is attached to this petition as Exhibit J.

12. On February 9, 1962, petitioner filed a Petition, entitled "For Rehearing of Motion to Transfer and Motion to Vacate Order Denying Motion to Transfer", a copy of which is attached to this petition as Exhibit K. The ground for this Petition was that the United States District Court was required to give full faith and credit to the order of the Circuit Court of Cook County, Illinois, and therefore, was required to transfer this action upon motion of The Chesapeake and Ohio Railway Company.

13. On March 20, 1962, the Honorable James B. Parsons entered an order denying petitioner's motion to transfer on rehearing. A copy of this order is attached to this petition as Exhibit L.

14. The United States District Court for the Northern District of Illinois was, and is, an inconvenient forum for the trial of the case filed by Jack J. Filbrun against petitioner. Transfer of the case to the United States District Court for the Western District of Michigan, Southern Division, would be for the convenience of the parties and wit- [fol. 6] nesses and in the interest of justice for the following reasons:

(1) Filbrun is a resident of Ludington, Michigan, which is approximately 300 miles from Chicago, Illinois and approximately 60 miles from Grand Rapids, Michigan.

(2) The accident of which Filbrun complained occurred in Ludington, Michigan.

(3) The seven doctors and chiropractors who examined and treated Filbrun at the time of his alleged injury, and immediately thereafter, all reside in Michigan.

(4) A Dr. Rabin, who did not examine or treat Filbrun until after he had retained his present Chicago attorneys to represent him, is the only witness, medical or otherwise, who does not reside in Michigan.

(5) Three of the four occurrence witnesses and two railroad employees who inspected the boxcar from which Filbrun fell, all reside in Ludington, Michigan.

(6) Seven of the eight medical witnesses will not be available to testify personally in Chicago, Illinois.

(7) The Circuit Court of Cook County, Illinois has previously dismissed the same case between the same parties on the ground that Cook County, Illinois is an inconvenient and inappropriate place for the trial of this action.

In failing to transfer the case as requested, the Honorable James B. Parsons abused his discretion. In failing [fol. 7] to give full faith and credit to the judgment of the Circuit Court of Cook County, the Honorable James B. Parsons denied petitioner's rights under 28 U.S.C. §1738.

Wherefore, your petitioner, The Chesapeake and Ohio Railway Company, prays that a rule be entered requiring the Honorable James B. Parsons to show cause why a writ of mandamus should not issue directing him to transfer the cause entitled *Jack J. Filbrun, Plaintiff*, vs. *The Chesapeake and Ohio Railway Company, a corporation, Defendant*, No. 61 C 1174, to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

The Chesapeake and Ohio Railway Company, Petitioner, By Robert A. Straub, General Claims Attorney.

Charles J. O'Laughlin, Holland C. Capper, Thompson, Raymond, Mayer & Jenner, 135 South LaSalle Street, Chicago 3, Illinois, RAndolph 6-0220, Attorneys for Petitioner.

[fol. 8] *Duly sworn to by Robert A. Straub, jurat omitted in printing.*

[fol. 9]

EXHIBIT A TO PETITION FOR MANDAMUS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

TRIAL BY JURY IS DEMANDED

COMPLAINT AT LAW

Now comes the plaintiff, JACK J. FILBRUN, by HENSLEE & HENSLEE, his attorneys, and for his complaint against the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, says:

1. That the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, is a corporation; that under its charter defendant is empowered to operate a system of railroads through the States of Illinois and Michigan and other states as a common carrier of passengers and freight for hire; that one of the lines of railroad operated by said defendant extends into the City of Chicago, County of Cook and State of Illinois where said defendant maintains offices and agents upon whom service of process may be had.

2. That at the time of the accident and injury hereinafter complained of, plaintiff was employed by defendant as a brakeman; that a part of the duties assigned to and performed by plaintiff were in the furtherance of interstate commerce and directly, closely and substantially affected such commerce; that at the time of the accident hereinafter complained of, plaintiff and defendant were subject to an Act of Congress of April 22, 1908, 35 Stat. 64, Chapter 149, as amended, commonly known as the Federal Employers'

Liability Act, 45 U.S.C.A., Sections 51-60, and to an Act [fol. 10] of Congress of March 2, 1893, c. 196, 27 Stat. 531, as amended, commonly known as the Federal Safety Appliance and Equipment Act, 45 U.S.C.A., Sections 1-32.

3. That on or about the 15th day of July, 1960, at or about the hour of 8:15 P.M., plaintiff was on duty in the capacity of a brakeman in defendant's East Yard at or near Ludington, Michigan.

4. That at the said time and place plaintiff was acting as an employee of defendant within the course of his employment and in the furtherance of the business of defendant.

5. That it then and there became and was the duty of defendant to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work.

6. That at said time and place plaintiff attempted to release the hand brake on a box car; that said brake suddenly and violently released causing plaintiff to fall from the car and to sustain the injuries hereinafter more specifically set forth.

7. That defendant, at the time and place alleged, wholly disregarding its duty toward plaintiff was negligent or guilty of unlawful conduct in one or more of the following ways when defendant knew, or in the exercise of ordinary care should have known, that this, under the circumstances then and there existing, would be liable to injure plaintiff.

(a.) In hauling, or using, or permitting to be hauled along its line of railroad a car with an inefficient brake contrary to and in violation of the provisions of 45 U.S.C.A., Section 11.

(b.) In failing to use ordinary care to furnish the plaintiff with a reasonably safe place in which to work and safe instrumentalities with which to work.

8. That as a direct and proximate result of one or more of the foregoing acts of negligence, the plaintiff was caused to be so injured that divers bones of his body were dislocated and broken; that pre-existing and latent defects became patent and aggravated; that divers muscles,

[fol. 11] membranes, nerves and blood vessels of his body were displaced, bruised, torn, injured and their function impaired; that his brain and nervous system were greatly shocked and injured and their functions impaired; that he became sick, sore, lame and disordered from thence hitherto; that he suffered great pain and anguish by reason of his said injuries; that he necessarily incurred great liability and indebtedness endeavoring to be cured thereof, and in the future will expend further considerable sums of money in that endeavor; that plaintiff has been and at divers times hereafter will be unable to attend to his customary affairs and business; that by reason thereof he has lost and hereafter will lose large sums of money as it is reasonably certain that he will be disabled due to his injuries, at divers times in the future, the exact time being unknown to the plaintiff at the present time.

WHEREFORE, plaintiff prays judgment against defendant in the sum of EIGHTY-SEVEN THOUSAND ($87,000.00) DOLLARS.

HENSLEE & HENSLEE
139 N. Clark Street
Chicago 2, Illinois
STate 2-5925

Attorneys for Plaintiff

[fol. 12]

EXHIBIT B TO PETITION

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,

Defendant.

NOTICE

To: HENSLEE & HENSLEE
139 North Clark Street
Chicago 2, Illinois
Attorneys for Plaintiff

PLEASE TAKE NOTICE that on Monday, April 17, 1961, at the hour of 9:30 A.M., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Thomas E. Kluczynski, Judge of said Court, in Room 909 in the County Building, Cook County, Illinois, or before any other Judge as may be sitting in his place and stead, and shall move the Court for the entry of an order dismissing the complaint on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum for the trial of the above entitled action. A copy of the motion, with attached affidavit, together with a draft order, is attached to this notice and hereby served upon you.

CHARLES J. O'LAUGHLIN
Attorney for Defendant

THOMPSON, RAYMOND, MAYER,
JENNER & BLOOMSTEIN
135 S. LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 13]

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,

Defendant.

MOTION TO DISMISS

Now comes defendant, The Chesapeake and Ohio Railway Company, by Thompson, Raymond, Mayer, Jenner & Bloomstein, and Charles J. O'Laughlin, its attorneys, and moves that the above entitled action be dismissed on the following grounds:

1. The Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum for the trial of the above entitled action.

2. Plaintiff was at the time of his alleged injury, and is now, a resident of Ludington, Michigan.

3. Defendant, The Chesapeake and Ohio Railway Company, is a corporation, incorporated under the laws of the State of Virginia, and does business in the State of Michigan and other states.

4. Defendant is subject to the processes of the courts, both state and federal, located in the State of Michigan.

5. All the witnesses (with the exception of a retired Railway employee who has moved to Arizona) having knowledge concerning circumstances out of which the alleged cause of action arose, now reside in the State of Michigan. These are:

[fol. 14]

Robert Bourgette 5451 Johnson Road Ludington, Michigan	Vernon E. Vanderveer 910 Maple Street Ludington, Michigan
Rockwell C. Hayes 905 Maple Street Ludington, Michigan	Carl R. Johnson 5394 Howley Road Ludington, Michigan
Jack W. Geil 1035 Beechwood Drive Ludington, Michigan	Robert S. Genson 22 Tapago Boulevard Winslow, Arizona

All of the named witnesses (with the exception of Robert S. Genson) are essential to the proper presentation by defendant of its case and will be called by defendant to testify in this case. The substance of their expected testimony and its materiality to the alleged cause of action is set forth in the affidavit attached to this motion as Exhibit A and made a part hereof.

6. In addition, the physicians listed below have examined the plaintiff and have knowledge of his condition material to this case. Their attendance and in-court testimony is essential to the proper presentation by the defendant of its defense to the plaintiff's alleged cause of action. The substance of their expected testimony and its materiality to the alleged cause of action is set forth in Exhibit A.

Richard C. Boelkins, M. D. 125-127 Fountain Street N. E. Grand Rapids, Michigan	I. J. Iverson, Chiropractor 909 South Washington Avenue Ludington, Michigan

John R. Carney, M. D.
202 N. Park Street
Ludington, Michigan

D. P. Moore, M.D., Radiology
50 College S. E.
Grand Rapids 3, Michigan

E. T. Kruse, Chiropractor
388 First Street
Manistee, Michigan

F. W. Sutter, M.D.
Ludington,
Michigan

Robert R. Garnau, M.D. Radiology
Paulina Stearns Hospital
Ludington, Michigan

7. The witnesses named in paragraphs 5 and 6 above would be called by defendant to testify in a convenient forum in Michigan. However, since the processes of the Circuit Court of Illinois cannot be utilized to compel their attendance in an Illinois forum, the below named witnesses [fol. 15] have indicated by Exhibit A their refusal or inability to testify concerning the facts of this case should it be tried in the Circuit Court of Cook County:

Richard C. Boelkins, M. D.

John R. Carney, M.D.

E. T. Kruse, Chiropractor

I. J. Iverson, Chiropractor

D. P. Moore, M.D.

F. W. Sutter, M.D.

Robert R. Garnau, M.D.

8. Although the attendance of the other employee witnesses named in paragraph 5 above can be procured by defendant should the trial of this action take place in the Circuit Court of Cook County, such trial will require their attendance at a place more than 300 miles from their places of work and their homes for periods from one to three days each. In addition to the cost of transporting these witnesses to Illinois, during their absences, defendant will be required to assign other persons, most of whom will not be

equally familiar with the performance of their duties to perform the duties of the respective witnesses. Defendant will be required to pay the regular wages of the witnesses while absent from their work as well as the wages of the persons substituting for them, in addition to the traveling and hotel expenses of the witness.

9. The testimony of these witnesses which have indicated by Exhibit A their refusal to attend trial in an Illinois forum, will have to be presented to the Court and jury through the use of deposition evidence. Depositions are not satisfactory means of presenting testimony to a jury. Accordingly, trial in Illinois will seriously handicap defendant's presentation of its defense.

10. There are competent and regularly functioning state courts in Ludington, Michigan, the county seat of Mason [fol. 16] County, and at other county seats in the State of Michigan, and there is a competent and regularly functioning federal district court sitting at Grand Rapids, Michigan, which is approximately 60 miles away from the place of plaintiff's employment and home. The procedural laws in force in the state courts of Michigan as well as in the federal courts located there, provide a full and complete opportunity to litigants in those courts to present the type of issues involved in the complaint herein.

11. The crowded dockets of this Court preclude an early trial. Michigan courts are less congested and a trial within one year may be expected. Defendant may be prejudiced by delay since some of the employee witnesses may retire and move to distant locations before this cause can be tried by this Court.

12. The three year statute of limitations does not expire until July 15, 1963. Plaintiff would in no way be prejudiced by dismissal of this action.

13. For the above reasons, the plaintiff's selection of an Illinois state forum is motivated by vexation and harassment. There is no connection with Illinois and the occurrence out of which the purported cause of action arose.

On the objective facts it is apparent that the intention of plaintiff was to import his purported cause of action into a forum where he anticipates a more generous reward.

WHEREUPON, defendant, The Chesapeake and Ohio Railway Company, moves that the plaintiff's complaint be dismissed.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

By: .....

.....

Its Attorneys

THOMPSON, RAYMOND, MAYER,
JENNER & BLOOMSTEIN
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 17]

EXHIBIT A TO MOTION TO DISMISS

AFFIDAVIT OF W. HAROLD WALLACE
DISTRICT CLAIM AGENT

STATE OF MICHIGAN)
COUNTY OF SAGINAW)

W. Harold Wallace, being duly sworn, deposes and says that he resides at Saginaw, Michigan; that for the past 38 years he has been in the employ of The Chesapeake and Ohio Railway Company; and that for the last 33 years he has held the position of District Claim Agent with that company.

Affiant has caused to be interviewed the persons below listed, who constitute all of the persons to his knowledge having knowledge concerning the injury suffered by Jack J. Filbrun at Ludington, Michigan, on July 15, 1960. Affiant believes that the in-court testimony of these witnesses is essential to the proper presentation by defendant of its defense to Mr. Filbrun's purported cause of action. The

names and addresses of the witnesses, together with the substance of their expected testimony are:

(1) Robert Bourgette
5451 Johnson Road
Ludington, Michigan

Mr. Bourgette is expected to testify that on July 15, 1960, he reported for duty at Ludington, Michigan, as conductor with engine 5224 to perform switching operations in the Ludington, Michigan area. He witnessed the incident whereby switchman, Jack J. Filbrun, fell from a boxcar brake platform. He was directly below Filbrun and broke his fall by catching him. He inspected the condition of the hand brake which Filbrun was releasing when he fell, along with the condition of all equipment attendant thereto. All equipment was in perfect working order. He noticed nothing wrong with the brake platform, ladder, sill steps or any [fol. 18] other part of the car when he went up to place the brake on the car soon after the accident occurred. All items of equipment mentioned above were free of all grease, oil, foreign objects and substances and were securely fastened and properly located and in good condition and repair.

(2) Vernon E. Vanderveer
910 Maple Street
Ludington, Michigan

Mr. Vanderveer is expected to testify that on the morning of July 16, 1960, he made an inspection along with assistant car foreman, Rockwell Hayes of the boxcar from which Filbrun fell (C.N. 521723). He found that the ladders, grab irons, sill steps, brake platform, brake wheel, and hand holds were all securely fastened, properly located and free from grease, oil or foreign objects and substances and in good condition and repair with no exceptions. He made a working test of the hand brake by tightening it and releasing it and found that it worked properly and was in good condition and repair.

(3) Rockwell C. Hayes
905 Maple Street
Ludington, Michigan

Mr. Hayes is expected to testify that he inspected the box-car involved in the accident (C.N. 521723) at Ludington, Michigan, on the morning of July 16, 1960. He made a working test of the brake by tightening it and releasing it and found the brake to be in good working condition. He found that the car involved was in good condition and repair and the grab irons, hand holds, and brake platform and the brake wheel and ladders were all in good condition and repair, securely fastened and properly located and all were free of grease, oil and all other foreign objects and substances.

(4) Carl R. Johnson
5394 Howley Road
Ludington, Michigan

[fol. 19] Mr. Johnson is expected to testify that he is an employee of The Chesapeake and Ohio Railway Company as a locomotive engineer and has been in its service for the past 31 years. On July 15, 1960, at about 8:15 P.M., the weather was clear, the ground was dry and there was good visibility. When switchman Jack Filbrun fell, the train was standing still on track No. 1, at Ludington, Michigan. It was necessary to release the hand brake because the engine almost stalled when Johnson attempted to pull the cars. Johnson was operating the engine from the North side and Filbrun got down from the engine on that side to let brakes off the train. Filbrun climbed up the leading end of the box-car which was next to the engine. He saw Filbrun fall. He saw conductor Bourgette break Filbrun's fall. He looked the car over and found everything in place and could see nothing wrong with the car and did not notice any grease, oil, or foreign objects or substances on the car. Nothing was loose on the car. He has known Mr. Filbrun since he was about 14 years old and has worked the same job as Filbrun many times before the fall.

(5) Jack W. Geil
1035 Beechwood Drive
Ludington, Michigan

Mr. Geil is expected to testify that he was a switchman working at Ludington, Michigan, on July 15, 1960, with the same train crew as Jack Filbrun. He was about four cars east of where the accident occurred. His first knowledge of the accident was when he got down onto the ground, looked to the west and saw Filbrun lying on the ground. He found Filbrun conscious when he arrived. Filbrun was lying across the north rail of the track, track No. 1, the track the train was on, with his head to the north. The conductor, engineer and fireman were with him at the time. He saw the ambulance arrive shortly following the accident and Filbrun was taken from the scene. Filbrun did not blame his fall on faulty equipment.

[fol. 20] (6) Robert S. Genson
22 Tapago Boulevard
Winslow, Arizona

Mr. Genson did not witness the accident and since his testimony would be cumulative, he will not be called by the defendant to testify.

Affiant has caused the employee witnesses identified above to be questioned concerning their willingness to go to Chicago, Illinois, for the purpose of testifying in this matter. They would go only if the Company ordered them to do so, paid all their transportation expenses plus other expenses while in Chicago, plus full pay for all time spent on such a trip.

In addition to the employee witnesses, affiant has interviewed or received written reports from the following named physicians and chiropractors. Affiant believes that the in-court testimony of these witnesses is essential to the proper presentation by defendant of its defense to Mr. Filbrun's purported cause of action. The names and addresses of the physicians and chiropractors, together with the substance of their expected testimony are:

(1) Richard C. Boelkins, M.D.
125-127 Fountain Street N.E.
Grand Rapids, Michigan

Dr. Boelkins is expected to testify that he is a physician specializing in industrial medicine; that on October 18, 1960, and November 12, 1960, he saw Jack J. Filbrun professionally and treated him for alleged injuries arising out of an accident which occurred on July 15, 1960 at Ludington, Michigan. He took a medical history, examined Mr. Filbrun's back, ordered x-rays of the cervical and dorsal spine. The x-rays revealed no significant findings. In Dr. Boelkin's opinion, Filbrun had no signs of any injury.

Dr. Boelkin states that he would be unable to leave his practice for the time required to testify in Chicago. He states, however, that he would be able to testify concerning this matter in Grand Rapids or Ludington, Michigan.

[fol. 21] (2) I. J. Iverson, Chiropractor
909 South Washington Avenue
Ludington, Michigan

Dr. Iverson is expected to testify that he saw Filbrun professionally on September 24, 26, 29, October 20 and November 7, 1960. Filbrun explained that he had fallen from a flat-car in July, 1960. Dr. Iverson could find nothing specific except some muscular tension. He recommended that Filbrun seek psychiatric help.

Dr. Iverson would be unable to leave his practice in Ludington, Michigan for the time required to testify in Chicago. He would be willing to testify concerning this matter in Ludington or Grand Rapids, Michigan.

(3) John R. Carney, M.D.
202 N. Park Street
Ludington, Michigan

Dr. Carney is expected to testify that he saw Filbrun on August 8, 1960, again late in August, 1960, on September 13, 1960, and also about one week later. Filbrun complained of pain in the left flank and pyuria. He was given azogantrisin with prompt clearing of the infection. In Sep-

tember 13, 1960, and approximately a week later, Filbrun had a reoccurrence of the pyuria and again had a left pyeloneaphritis. He was given furadantin. The next week the urine was clear again, but he still complained of pain. An IVP was done and it was negative.

Dr. Carney would be unable to leave his practice for the time required to testify in Chicago. He indicates that he would be available to testify concerning this matter in a court in Grand Rapids or Ludington.

(4) D. P. Moor M.D.
Radiology
50 College S. E.
Grand Rapids 3, Michigan

[fol. 22] Dr. Moore is expected to testify that on November 12, 1960, at the reference of Dr. Boelkins, he examined x-rays of the cervical and dorsal spine region of Jack Filbrun. No evidence of osseous injury to the spine was observed. The intervertebral disc spaces were maintained. There was no abnormality in the upper dorsal or cervical spine, and none in the lower dorsal spine except for some mild hypertrophic lipping.

Dr. Moore states he would be unable to leave his practice for the time required to testify in Chicago. He states that he would be able to testify concerning this matter in Grand Rapids or Ludington, Michigan.

(5) E. T. Kruse, Chiropractor
388 First Street
Manistee, Michigan

Dr. Kruse is expected to testify that he saw Filbrun on November 21, 28 and December 5, 1960. Filbrun complained of lower back pain and an examination revealed a lumbo sacral strain which was a routine condition. The condition responded satisfactorily and appeared corrected.

Dr. Kruse states that he would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Ludington or Grand Rapids, Michigan.

(6) Dr. F. W. Sutter, M.D.
Ludington,
Michigan

Dr. Sutter is expected to testify that he saw Mr. Filbrun on several different dates following his injury on July 15, 1960. In his opinion Filbrun suffered back muscle bruising and strain and was released to return to work on August 31, 1960.

Dr. Sutter would be unable to leave his practice for the time required to testify in Chicago. He states that he would [fol. 23] be willing to testify concerning this matter in a court in Ludington or Grand Rapids, Michigan.

(7) Robert R. Garnau, M.D. Radiology
Paulina Stearns Hospital
Ludington, Michigan

Dr. Garnau is expected to testify that on September 20, 1960, at the request of Dr. J. Carney, he performed an x-ray examination of the abdomen of Jack Filbrun. No calculi were noted in the region of the urinary collecting systems to suggest a renal or ureteral calculi. The soft tissue shadows of the psoas muscles and kidney outlines were not abnormal. No abnormalities of the boney structures were noted. The test was negative.

Dr. Garnau would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Ludington or Grand Rapids, Michigan.

/s/ W. Harold Wallace

Subscribed & sworn to before me,
a Notary Public authorized to take
oaths in the State of Michigan,
this 7th day of April, 1961.

/s/ Arthur Beyer
Notary Public

My commission expires:

[fol. 24]

EXHIBIT C TO PETITION FOR MANDAMUS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

ANSWER TO MOTION TO DISMISS

Now comes the plaintiff, JACK J. FILBURN, by HENSLEE & HENSLEE, his attorneys, and in answer to the material allegations in the Motion To Dismiss heretofore filed by the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation says:

1. Plaintiff denies that this court is either an inconvenient or an inappropriate forum for the trial of the instant cause.

2. Plaintiff admits that he was and is a resident of Ludington, Michigan.

3. Plaintiff admits that THE CHEASAPEAKE AND OHIO RAILWAY COMPANY is a corporation, incorporated under the laws of the State of Virginia and that said defendant does business in Michigan and other states; plaintiff further avers on information and belief that defendant does a substantial volume of railroad business in the carriage of passengers and freight for hire to and from Chicago, Illinois, and maintains many executive offices in Chicago for the handling of its business including the positions of Freight Traffic Manager, Assistant Freight Traffic Manager, Manager and Assistant Manager, World Commerce, General Coal Traffic Agent, Assistant Coal Traffic Agent, Terminal

Superintendent, General Agent—Passenger Department and Western Passenger Agent.

[fol. 25] 4. Plaintiff admits that defendant is subject to process issued by at least some of the State and Federal Courts located in Michigan.

5. Plaintiff is without knowledge sufficient to form a belief as to the present address of defendant's employees and former employee named in paragraph 5; plaintiff denies that all of the five named witnesses are essential to the proper presentation of defense of its case.

6. Plaintiff admits that Drs. Boelkins, Carney and Sutter and the two chiropractors named in paragraph 6 had occasion to examine the plaintiff; plaintiff denies that the attendance and "in court" testimony of said witnesses is essential to the defense of the case.

7. Plaintiff is without knowledge sufficient to form a belief as to the truth of the allegations in paragraph 7; plaintiff avers on information and belief that said medical doctors either have been compensated by defendant corporation or have submitted bills to defendant corporation for said services or hereafter will submit such bills to defendant.

8. Plaintiff admits that the attendance of defendant's employees at a trial in this forum would necessitate their absence from their home for a minimum of one day; plaintiff is without information sufficient to form a belief as to the allegations that said employees would necessarily be absent from their assigned duties.

9. Plaintiff denies the allegations of paragraph 9.

10. Plaintiff admits that there are courts in Ludington, Michigan and at Grand Rapids, Michigan; plaintiff avers that the attorney handling this case in behalf of plaintiff is not admitted to practice in said courts, and plaintiff is without knowledge as to the practice or "regular functioning" of said courts in which defendant prefers to try this case.

11. Plaintiff is without information sufficient to form a belief as to the allegation of expeditious trials in said Michi-

gan courts; plaintiff denies that defendant will be prejudiced by trial of this cause in this forum.

[fol. 26] 12. Plaintiff denies the allegation that it would not be prejudiced by dismissal of this cause.

13. Plaintiff denies that its selection of this forum was motivated by vexation or harassment; plaintiff denies the allegation that there is no connection between Illinois and this cause of action; plaintiff denies that this cause of action was imported and avers that the suit was properly filed in this forum.

14. That the Congress of the United States, pursuant to the terms of the Federal Employers' Liability Act, has given to the plaintiff (and not to the defendant) the benefit of selecting the forum in which to have his cause of action tried.

15. That plaintiff expects to present the evidence of all eye witnesses to the accident giving rise to the instant suit.

16. That plaintiff on two occasions has been hospitalized in Chicago, Illinois; that surgery was performed on plaintiff in Chicago by G. J. Rabin, M. D.; that the major medical and surgical care for the injuries sustained by plaintiff has been rendered in Chicago, Illinois.

17. That the affidavit of defendant's claim agent affords no basis for concluding that the doctors named therein would not be able to attend trial in Chicago if, in fact, the defendant so desired their personal appearance in Court; that the testimony of said doctors can be satisfactorily presented in deposition form if said testimony indeed is at all necessary in view of the subsequent treatments and surgery rendered in Chicago.

18. That there is no factual showing in defendant's motion or supporting affidavit that plaintiff's choice of this forum was a purely vexatious effort by plaintiff to harass the defendant.

[fol. 27] 19. That there is no factual showing in defendant's motion or supporting affidavit as to the additional expense, if any, that defendant would incur if the instant

cause should be tried in Chicago rather than in the courts so clearly the choice of the defendant.

20. That there is no factual showing in defendant's motion or supporting affidavit that the evidence, if any, to be produced by defendant could not adequately be submitted by deposition.

And in support of this Answer to Motion to Dismiss the plaintiff files the attached affidavit of KEITH E. ROBERTS.

/s/ HENSLEE & HENSLEE
HENSLEE & HENSLEE,
139 N. Clark Street
Suite 810
Chicago 2, Illinois
STate 2-5925

Attorneys for Plaintiff

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

Shirley Kortendick, being first duly sworn, on oath deposes and says that a copy of Answer to Motion to Dismiss and supporting Affidavit were served upon defendant by placing same in an envelope, with proper postage affixed thereto, addressed to Thompson, Raymond, Mayer, Jenner and Bloomstein, 135 S. La Salle Street, Chicago 3, Illinois and placing said envelope in the U. S. Mail Chute at 139 North Clark Street, Chicago 2, Illinois on the 18th day of April, 1961.

/s/ SHIRLEY KORTENDICK

SUBSCRIBED and SWORN to
before me this 19th day of
April, 1961.

/s/ FRANK PETRO
Notary Public

[fol. 28]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

KEITH E. ROBERTS, being first duly sworn, on oath deposes and says:

1. That affiant is a member of the law firm of HENSLEE & HENSLEE; that said affiant is handling the instant cause on behalf of plaintiff; that affiant makes this affidavit in opposition to the motion of defendant heretofore filed in this cause to dismiss the above-entitled cause of action.

2. That defendant is a foreign corporation, and is a corporation authorized to transact business in the State of Illinois as a common carrier by railroad; that said defendant performs a substantial business in the carriage of passengers and freight for hire to and from Chicago, Illinois.

3. That a reasonable estimate of the time required for trial of this cause would be from two to three days.

4. That it is plaintiff's intention to present at the trial the testimony of all occurrence witnesses.

5. That plaintiff on two occasions was hospitalized in Chicago for treatment of the injuries sustained in the acci-

dent giving rise to the instant suit; that surgery was performed on plaintiff by G. J. Rabin, M. D., in Chicago; that plaintiff will present testimony at the trial pertaining to [fol. 29] said hospitalization and surgery.

6. That on information and belief defendant maintains a number of executive offices in Chicago including, but not limited to those occupied by its Freight Traffic Manager, Assistant Freight Traffic Manager, Manager and Assistant Manager, World Commerce, General Coal Traffic Agent, Assistant Coal Traffic Agent, Terminal Superintendant, General Agent—Passenger Department and Western Passenger Agent.

7. That affiant is not licensed to practice in any of the courts in which defendant prefers to try this case.

/s/ KEITH E. ROBERTS

SUBSCRIBED and SWORN
to before me this 19 day
of April, 1961.

/s/ FRANK PETRO
Notary Public

[fol. 30]

EXHIBIT D TO PETITION FOR MANDAMUS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

ORDER

This cause coming on to be heard on the motion of The Chesapeake and Ohio Railway Company for the dismissal of the above entitled action, on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum,

IT IS HEREBY ORDERED that the action be and the same is hereby dismissed.

ENTER:

/s/ KLUCZYNSKI
Judge

DATED: May 15, 1961

[fol. 31]

EXHIBIT E TO PETITION FOR MANDAMUS

STATE OF ILLINOIS,
COUNTY OF COOK, ss.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Motion Number .....

General Number 61 C 2214

JACK J. FILBRUN,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,

NOTICE

To Thompson, Raymond, Mayer,
Jenner and Bloomstein
Attorney for Defendant
135 S. La Salle Street,
Chicago 3, Illinois

Please take notice that on the 26th day of May A. D. 1961 at 9:30 A.M., or as soon thereafter as this motion may be heard, we shall appear before his honor, Judge Thomas E. Kluczynski in the room usually occupied by him as a courtroom in the Courthouse, No. 100 to 148 North Clark Street, in the City of Chicago, or, in his absence, before any other judge, who may be sitting in his place and stead, and then and there

~~(a) present the motion of the undersigned that~~

(b) present a petition, a copy of which is herewith served upon you, for rehearing of Motion to Dismiss and Motion to Vacate Order Dismissing Case.

at which time and place you may appear if you so desire.

HENSLEE & HENSLEE
Attorney for Plaintiff
Address 139 N. Clark Street, Suite 810,
Chicago 2, Illinois
Telephone STate 2-5925

[fol. 32]

STATE OF ILLINOIS,
COUNTY OF COOK, ss.

Shirley Kortendick being first duly sworn, deposes and says that she served the within notice and petition therein referred to upon Thompson, Raymond, Mayer, Jenner and Bloomstein, 135 S. La Salle Street, Chicago 3, Illinois by placing copy of the same to said attorneys in the U. S. Mail Chute at 139 N. Clark Street, Chicago 2, Illinois on the 16 day of May A. D. 1961 at 5:00 o'clock P.M.

That the above named parties are all the parties that have filed appearances and have not heretofore been found by the Court to be in default for failure to plead.

/s/ SHIRLEY KORTENDICK

Subscribed and sworn to before
me this 16th day of May, A. D. 1961

/s/ FRANK PETRO
Notary Public

[fol. 33]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

PETITION FOR REHEARING OF MOTION TO DISMISS AND MOTION TO VACATE ORDER DISMISSING CAUSE

Now comes the plaintiff, JACK J. FILBRUN, by HENSLEE & HENSLEE, his attorneys, and petitions this Court for a rehearing of the Motion to Dismiss this cause which was granted on May 15, 1961, and files this its Motion to Vacate the Order Dismissing This Cause, and, in support of its petition and motion says:

1. That the requirements of justice demand that this cause be tried in this forum in accordance with the federal right to a choice of venue granted the plaintiff by the Federal Employers Liability Act.

2. That there is no evidence that the plaintiff's choice of forum was, is, or could be vexatious.

3. That the demands of substantial justice require that plaintiff be permitted to try this case in the jurisdiction in which he has received primary and substantial medical and surgical attention.

And in support of this petition the plaintiff files the attached Affidavit of KEITH E. ROBERTS.

/s/ HENSLEE & HENSLEE
HENSLEE & HENSLEE
139 N. Clark Street,
Suite 810,
Chicago 2, Illinois
Attorneys for Plaintiff

[fol. 34]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

AFFIDAVIT

KEITH E. ROBERTS, being first duly sworn, on oath deposes and says:

1. That affiant is a member of the law firm of HENSLEE & HENSLEE and is handling the instant cause on behalf of plaintiff. That acting in said capacity affiant has reviewed his investigative and medical file and on that basis submits this affidavit.

2. That following his accident and injury on July 15, 1960, plaintiff was examined by a succession of doctors, most of whom were selected by and/or compensated by defendant, that said doctors advised plaintiff that they could find nothing seriously wrong with him; that the character of the treatment rendered is typified by the letter to plaintiff from Richard C. Boelkins, M. D. annexed hereto as Exhibit A, which necessitated the seeking by plaintiff of non-railroad associated or sponsored medical care.

3. That on or about December 20, 1960, plaintiff came to the office of affiant seeking legal advice and competent medical care from an orthopedic specialist not affiliated or associated with a railroad company.

4. That on or about December 20, 1960, affiant arranged for an examination of plaintiff by a competent orthopedic specialist, G. J. Rabin, in Chicago. That as a result of

that examination Dr. Rabin concluded and would so testify that plaintiff sustained a serious injury to the neck and [fol. 35] lower back and recommended that plaintiff be hospitalized for conservative treatment.

5. That on January 17, 1961 plaintiff was admitted to Alexian Brothers Hospital in Chicago with acute pain in the neck with radiating pain and symptomatology down the left upper extremity and acute pain in the low back radiating down the lower extremities, that during said period of hospitalization plaintiff was placed in cervical and pelvic traction and was given an intensive course of physiotherapy and anti-spasmodic medication; that on or about February 3, 1961 plaintiff was discharged from said hospital.

6. That on February 17, 1961, plaintiff was readmitted to Alexian Brothers Hospital where a myelographic study was performed revealing a ruptured intervertebral defect; that on February 23, 1961, a laminectomy and spinal fusion was performed by G. J. Rabin, M.D., at which time a large ruptured intervertebral disc between L-5 and S-1, which was causing compression of the spinal cord, was removed; that plaintiff was fitted with a torso spica cast and discharged from the hospital on March 3, 1961.

7. That in the trial of this cause the doctor most competent to testify concerning the myelographic study and surgery performed upon plaintiff is G. J. Rabin, M.D.; that to induce said doctor to appear in Ludington or Grand Rapids, or elsewhere in Michigan, would require an expenditure by plaintiff of a minimum of $1,000.00; that arrangements can be made to have Dr. Rabin testify in this court without causing him to forego any of the surgery customarily performed by said doctor five or six days per week.

8. That should defendant make any issue as to the condition, care or treatment of plaintiff, it would be necessary for plaintiff to produce as witnesses the roentgenologist, assisting surgeon, nurses, anesthetist and therapists [fol. 36] at Alexian Brothers Hospital who assisted in the care and treatment of plaintiff; that said witnesses, five

or more in number, could much more readily, more conveniently and less expensively be produced in Chicago than in a foreign jurisdiction; that the estimated cost to the plaintiff of producing said witnesses in a foreign jurisdiction would be approximately $1,500.00.

9. That to date plaintiff has incurred medical expenses in Chicago in the amount of $1,425.00 and hospital expenses in Chicago in the amount of $1,066.60; that plaintiff is now and hereafter will continue to be under the care of Dr. Rabin for a period of many months.

10. That to relieve defendant of any unnecessary expense plaintiff will produce the testimony of all occurrence witnesses in Chicago at plaintiff's expense.

/s/ KEITH E. ROBERTS
KEITH E. ROBERTS

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

SUBSCRIBED and SWORN
to before me this 16 day
of May, 1961.

/s/ FRANK PETRO
Notary Public

[fol. 37]

EXHIBIT "A" TO PETITION

TELEPHONE 5-8622

RICHARD C. BOELKINS, M. D.

125-127 FOUNTAIN ST., N. E.

GRAND RAPIDS 3, MICHIGAN

November 16, 1960.

Mr. Jack J. Filbrun
414 N. Lewis St.
Ludington, Michigan.

Dear Jack:

Just a note to inform you that X-rays of your neck and back taken by Dr. Fellows and Moore on November 12, 1960 were completely negative for injury to the bones or joint spaces.

I am sorry to learn that you still had symptoms. Let me assure you that there is no evidence of any disease or injury to cause you anxiety. Therefore I know that working will not be harmful to you.

I hope you will find it possible to relax once in a while. A good hot soak in the tub and a couple aspirin will give relief to most muscular aches. Gradually I believe you will completely recover.

If I can be of any further help to you please feel free to call on me.

Sincerely

/s/ R. C. BOELKINS
Richard C. Boelkins M.D.

R.C.B./R.S.

[fol. 38]

EXHIBIT F TO PETITION FOR MANDAMUS

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

General No. 61C2214

JACK J. FILBRUN

vs.

THE CHESAPEAKE & OHIO RAILWAY

This cause coming on to be heard on the plaintiff's petition for rehearing of motion to dismiss and motion to vacate order dismissing cause and the Court having considered the affidavit of Keith E. Roberts under date of May 16, 1961 and the affidavits heretofore filed by plaintiff and defendant, and having heard the arguments of counsel,

It is hereby ordered: that the Petition for Rehearing of motion to dismiss and the motion to vacate order dismissing cause be and the same are hereby denied.

Enter

.....

Judge

Jun 8, 1961

[fol. 39]

EXHIBIT G TO PETITION FOR MANDAMUS

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action File No. 61 C 1174

JACK J. FILBRUN,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

SUMMONS

To the above named Defendant:

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

You are hereby summoned and required to serve upon HENSLEE & HENSLEE plaintiff's attorney, whose address 139 North Clark Street, Chicago 2, Illinois, STate 2-5925 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

ROY H. JOHNSON
Clerk of Court.

MARGUERITE GILMOUR
Deputy Clerk.

Date: July 11, 1961

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 40]

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DISTRICT

No. 61C1174

JACK J. FILBRUN

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation

SUMMONS IN CIVIL ACTION

Returnable not later than 20 days after service.

HENSLEE & HENSLEE
139 North Clark St. Suite 810
Chicago 2, Illinois
STate 2-5925
Attorney for Plaintiff.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 , I received this summons and served it together with the complaint herein as follows:

.....
United States Marshal.

By.....
Deputy United States Marshal.

MARSHAL'S FEES
Travel..... $.....
Service ....

Subscribed and sworn to before me, a this day of , 19 .

.....

[SEAL]

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

[fol. 41]

EXHIBIT G TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

TRIAL BY JURY DEMANDED

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

COMPLAINT AT LAW

Now comes the plaintiff, JACK J. FILBRUN, by HENSLEE & HENSLEE, his attorneys, and for his complaint against the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, says:

1. That the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, is a corporation; that under its charter defendant is empowered to operate a railroad system through the States of Illinois and Michigan and other states as a common carrier of passengers and freight for hire; that said defendant is doing business within the jurisdiction of this court, and that one of the lines of railroad operated by said defendant extends into the City of Chicago, County of Cook and State of Illinois where said defendant maintains offices and agents upon whom service of process may be had.

[fol. 42] 2. That at the time of the accident and injury hereinafter complained of, plaintiff was employed by defendant as a brakeman; that a part of the duties assigned to and performed by plaintiff were in the furtherance of

interstate commerce and directly, closely and substantially affected such commerce; that at the time of the accident hereinafter complained of, plaintiff and defendant were subject to an Act of Congress of April 22, 1908, 35 Stat. 64, Chapter 149, as amended, commonly known as the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51-60, and to an Act of Congress of March 2, 1893, c. 196, 27 Stat. 531, as amended, commonly known as the Federal Safety Appliance and Equipment Act, 45 U.S.C.A., Sections 1-32.

3. That on or about the 15th day of July, 1960, at or about the hour of 8:15 P.M., plaintiff was on duty in the capacity of a brakeman in defendant's East Yard at or near Ludington, Michigan.

4. That at the said time and place plaintiff was acting as an employee of defendant within the course of his employment and in the furtherance of the business of defendant.

5. That it then and there became and was the duty of defendant to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work.

[fol. 43] 6. That at said time and place plaintiff attempted to release the hand brake on a box car; that said brake suddenly and violently released causing plaintiff to fall from the car and to sustain the injuries hereinafter more specifically set forth.

7. That defendant, at the time and place alleged, wholly disregarding its duty toward plaintiff was negligent or guilty of unlawful conduct in one or more of the following ways when defendant knew, or in the exercise of ordinary care should have known, that this, under the circumstances then and there existing, would be liable to injure plaintiff:

(a) In hauling, or using, or permitting to be hauled along its line of railroad a car with an inefficient brake contrary to and in violation of the provisions of 45 U.S. C.A., Section 11.

(b) In failing to use ordinary care to furnish the plaintiff with a reasonably safe place in which to work and safe instrumentalities with which to work.

8. That as a direct and proximate result of one or more of the foregoing unlawful or negligent acts or omissions, the plaintiff was caused to be so injured that pre-existing and latent defects became patent and aggravated; that divers muscles, membranes, nerves and blood vessels of his body were displaced, bruised, torn, injured and their [fol. 44] functions impaired; that his brain and nervous system were greatly shocked and injured and that he sustained a brain concussion; that he sustained a rupture of one or more interverbral discs, that he became sick, sore, lame and disordered from thence hitherto; that he suffered great pain and anguish by reason of his said injuries; that he necessarily incurred great liability and indebtedness for medical attention, hospitalization and surgery endeavoring to be cured thereof, and in the future will expend further considerable sums of money in that endeavor; that plaintiff has been and at divers times hereafter will be unable to attend to his customary affairs and business; that by reason thereof he has lost and hereafter will lose large sums of money as it is reasonably certain that he will be disabled due to his injuries at divers times in the future, the exact time being unknown to the plaintiff at the present time.

WHEREFORE, plaintiff prays judgment against defendant in the sum of ONE HUNDRED AND EIGHTY-FIVE THOUSAND ($185,000.00) DOLLARS.

HENSLEE & HENSLEE
139 North Clark Street
Chicago 2, Illinois
STate 2-5925

Attorneys for Plaintiff

[fol. 45]

EXHIBIT H TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 61 C 1174

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

NOTICE

To: HENSLEE & HENSLEE
139 North Clark Street
Chicago 2, Illinois
Attorneys for Plaintiff

PLEASE TAKE NOTICE that on Wednesday, August 23, 1961, at 10:00 A.M. or as soon thereafter as counsel may be heard, we shall appear before the Honorable Julius Hoffman, in the room usually occupied by him as a courtroom in the Federal Building, Chicago, Illinois, or before any other judge who may be sitting in his place and stead, and present to the Court a motion to transfer this cause and to set a date certain for the hearing of the motion.

A copy of the motion with attached exhibits is appended to this notice and hereby served upon you.

CHARLES J. O'LAUGHLIN
Attorney for Defendant

Thompson, Raymond, Mayer,
Jenner & Bloomstein
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 46]

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

....., being first duly sworn, on oath deposes and says that she served the foregoing notice, together with a copy of the motion with attached exhibits therein referred to, on the attorneys named therein, by depositing copies of the same in the United States mail chute at 135 South LaSalle Street, Chicago, Illinois, enclosed in an envelope addressed to said attorneys, with postage fully prepaid thereon, on the ..... day of ....., 1961.

.....

Subscribed and sworn to
before me this ..... day of
....., 1961.

.....
Notary Public

[fol. 47]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 61 C 1174

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

MOTION TO TRANSFER

Now comes defendant, The Chesapeake and Ohio Railway Company, by Thompson, Raymond, Mayer, Jenner & Bloomstein, and Charles J. O'Laughlin, its attorneys, and pursuant to Section 1404(a) of the Judicial Code, 28 U.S.C. §1404(a), moves that the above entitled action be transferred to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan, on the following grounds:

1. Plaintiff was at the time of his alleged accident, and is now, a resident of Ludington, Michigan, which is approximately sixty miles from Grand Rapids, Michigan.

2. Defendant, The Chesapeake and Ohio Railway Company, is a corporation, incorporated under the laws of the State of Virginia, and does business in the State of [fol. 48] Michigan and other states.

3. Defendant is subject to the processes of the courts, both State and Federal, located in the State of Michigan.

4. All of the witnesses (with the exception of a retired railway employee who has moved to Arizona) having knowledge concerning circumstances out of which the alleged

cause of action arose, now reside in and around Ludington, Michigan. These are:

Robert Bourgette 5451 Johnson Road Ludington, Michigan	Vernon E. Vanderveer 910 Maple Street Ludington, Michigan
Rockwell C. Hayes 905 Maple Street Ludington, Michigan	Carl R. Johnson 5394 Howley Road Ludington, Michigan
Jack W. Geil 1035 Beechwood Drive Ludington, Michigan	Robert S. Genson 22 Tapago Boulevard Winslow, Arizona

All of the named witnesses (with the exception of Robert S. Genson) are essential to the proper presentation by defendant of its case and will be called by defendant to testify in this case. The substance of their expected testimony and its materiality to the alleged cause of action is set forth in the affidavit attached to this motion as Exhibit A and made a part hereof.

5. In addition, the physicians listed below have examined the plaintiff and have knowledge of his condition material to this case. Their attendance and in-court testimony is [fol. 49] essential to the proper presentation by the defendant of its defense to the plaintiff's alleged cause of action. The substance of their expected testimony and its materiality to the alleged cause of action is set forth in Exhibit A.

Richard C. Boelkins, M.D.
125-127 Fountain Street N.E.
Grand Rapids, Michigan

John R. Carney, M.D.
202 N. Park Street
Ludington, Michigan

E. T. Kruse, Chiropractor
388 First Street
Manistee, Michigan

I. J. Iverson, Chiropractor
909 South Washington Avenue
Ludington, Michigan

D. P. Moore, M.D., Radiology
50 College S. E.
Grand Rapids 3, Michigan

F. W. Sutter, M.D.
Ludington,
Michigan

Robert R. Garnau, M.D., Radiology
Paulina Stearns Hospital
Ludington, Michigan

6. The witnesses named in paragraphs 4 and 5 above would be called by defendant to testify in the United States District Court sitting in Grand Rapids, Michigan. However, the processes of the United States District Court for the Northern District of Illinois cannot be utilized to compel their attendance in this forum, and the below named witnesses have indicated by Exhibit A their refusal or inability [fol. 50] to testify concerning the facts of this case should the trial be held in this Court:

(1) Richard C. Boelkins, M.D.

(2) John R. Carney, M.D.

(3) E. T. Kruse, Chiropractor

(4) I. J. Iverson, Chiropractor

(5) D. P. Moore, M.D.

(6) F. W. Sutter, M.D.

(7) Robert R. Garnau, M.D.

7. Although the attendance of the other employee witnesses named in paragraph 4 above can be procured by defendant should the trial of this action take place in Chicago, Illinois, such trial will require their attendance at a place more than 300 miles from their places of work and their homes for periods of from one to three days each. In

addition to the cost of transporting these witnesses to Chicago, during their absences, defendant will be required to assign other persons, most of whom will not be equally familiar with the performance of their duties to perform the duties of the respective witnesses. Defendant will be required to pay the regular wages of the witnesses while absent from their work as well as the wages of the persons substituting for them, in addition to the traveling and hotel expenses of the witnesses.

8. The testimony of those witnesses which have indicated by Exhibit A their refusal or inability to attend trial in Chicago, will have to be presented to the Court and jury through the use of deposition evidence. Depositions are [fol. 51] not satisfactory means of presenting testimony to a jury. Accordingly, trial in this Court will seriously handicap defendant's presentation of its defense.

9. The crowded dockets of this Court preclude an early trial. Michigan courts are less congested and a trial within one year may be expected. Both parties will be prejudiced by delay.

10. The three (3) year statute of limitations does not expire until July 15, 1963. Plaintiff would in no way be prejudiced by the transferring of this action to the United States District Court sitting in Grand Rapids, Michigan.

11. There is no connection with Illinois and the occurrence out of which the purported cause of action arose.

12. The Circuit Court of Cook County, Illinois has held, prior to the commencement of this action in the United States District Court for the Northern District of Illinois, in an action captioned Jack J. Filbrun, Plaintiff vs. The Chesapeake and Ohio Railway Company, a corporation, Defendant, No. 61 C 2214, filed in the Circuit Court of Cook County, Illinois on February 10, 1961, that an Illinois forum is an inconvenient and inappropriate forum for the trial of this action. A copy of the pleadings, motion to dismiss of the defendant, and the court order, together with an order entered upon plaintiff's petition for a rehearing, is attached to this motion as Exhibit B and made a part

[fol. 52] hereof. The judgment of the Circuit Court of Cook County holding, as to the same parties to this action, that an Illinois court is an inconvenient and inappropriate forum, is res judicata on that point.

WHEREFORE, defendant, The Chesapeake and Ohio Railway Company, moves that the above entitled action be transferred to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant

CHARLES J. O'LAUGHLIN,
Its Attorney

Thompson, Raymond, Mayer,
Jenner & Bloomstein
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 53]

EXHIBIT "A" TO MOTION

AFFIDAVIT OF W. HAROLD WALLACE
DISTRICT CLAIM AGENT

STATE OF MICHIGAN)
) ss.
COUNTY OF SAGINAW)

W. Harold Wallace, being duly sworn, deposes and says that he resides at Saginaw, Michigan; that for the past 38 years he has been in the employ of The Chesapeake and Ohio Railway Company; and that for the last 33 years he has held the position of District Claim Agent with that company.

Affiant has caused to be interviewed the persons below listed, who constitute all of the persons to his knowledge having personal knowledge concerning the injury suffered by Jack J. Filbrun at Ludington, Michigan, on July 15,

1960. Affiant believes that the in-court testimony of these witnesses is essential to the proper presentation by defendant of its defense to Mr. Filbrun's purported cause of action. The names and addresses of the witnesses, together with the substance of their expected testimony are:

(1) Robert Bourgette
5451 Johnson Road
Ludington, Michigan

Mr. Bourgette is expected to testify that on July 15, 1950, he reported for duty at Ludington, Michigan, as conductor with engine 5224 to perform switching operations in the Ludington, Michigan area. He witnessed the incident whereby switchman Jack J. Filbrun fell from a boxcar brake platform. He was directly below Filbrun and broke [fol. 54] his fall by catching him. He inspected the condition of the hand brake which Filbrun was releasing when he fell, along with the condition of all equipment attendant thereto. All equipment was in perfect working order. He noticed nothing wrong with the brake platform, ladder, sill steps or any other part of the car when he went up to place the brake on the car soon after the accident occurred. All items of equipment mentioned above were free of all grease, oil, foreign objects and substances and were securely fastened and properly located and in good condition and repair.

(2) Vernon E. Vanderveer
910 Maple Street
Ludington, Michigan

Mr. Vanderveer is expected to testify that on the morning of July 16, 1960, he made an inspection along with assistant car foreman Rockwell Hayes of the boxcar from which Filbrun fell (C.N. 521723). He found that the ladders, grab irons, sill steps, brake platform, brake wheel, and hand holds were all securely fastened, properly located and free from grease, oil or foreign objects and substances and in good condition and repair with no exceptions. He made a working test of the hand brake by tightening it and re-

leasing it and found that it worked properly and was in good condition and repair.

(3) Rockwell C. Hayes
905 Maple Street
Ludington, Michigan

Mr. Hayes is expected to testify that he inspected the boxcar involved in the accident (C.N. 521723) at Ludington, [fol. 55] Michigan, on the morning of July 16, 1960. He made a working test of the brake by tightening it and releasing it and found the brake to be in good working condition. He found that the car involved was in good condition and repair and the grab irons, hand holds, and brake platform and the brake wheel and ladders were all in good condition and repair, securely fastened and properly located and all were free of grease, oil and all other foreign objects and substances.

(4) Carl R. Johnson
5394 Howley Road
Ludington, Michigan

Mr. Johnson is expected to testify that he is an employee of The Chesapeake and Ohio Railway Company as a locomotive engineer and has been in its service for the past 31 years. On July 15, 1960, at about 8:15 P.M., the weather was clear, the ground was dry and there was good visibility. When switchman Jack Filbrun fell, the train was standing still on track No. 1, at Ludington, Michigan. It was necessary to release the hand brake because the engine almost stalled when Johnson attempted to pull the cars. Johnson was operating the engine from the North side and Filbrun got down from the engine on that side to let brakes off the train. Filbrun climbed up the leading end of the boxcar which was next to the engine. He saw Filbrun fall. He saw conductor Bourgette break Filbrun's fall. He looked the car over and found everything in place and could see nothing wrong with the car and did not notice any grease, oil, or foreign objects or substances on the car. Nothing was loose on the car. He has known Mr. Filbrun since he [fol. 56] was about 14 years old and has worked the same job as Filbrun many times before the fall.

(5) Jack W. Geil
1035 Beechwood Drive
Ludington, Michigan

Mr. Geil is expected to testify that he was a switchman working at Ludington, Michigan, on July 15, 1960, with the same train crew as Jack Filbrun. He was about four cars east of where the accident occurred. His first knowledge of the accident was when he got down onto the ground, looked to the west and saw Filbrun lying on the ground. He found Filbrun conscious when he arrived. Filbrun was lying across the north rail of the track, track No. 1, the track the train was on, with his head to the north. The conductor, engineer and fireman were with him at the time. He saw the ambulance arrive shortly following the accident and Filbrun was taken from the scene. Filbrun did not blame his fall on faulty equipment.

(6) Robert S. Genson
22 Tapago Boulevard
Winslow, Arizona

Mr. Genson did not witness the accident and since his testimony would be cumulative, he will not be called by the defendant to testify.

Affiant has caused the employee witnesses identified above to be questioned concerning their willingness to go to Chicago, Illinois, for the purpose of testifying in this matter. They would go only if the Company ordered them to do so, paid all their transportation expenses plus other expenses [fol. 57] while in Chicago, plus full pay for all time spent on such a trip.

In addition to the employee witnesses, affiant has interviewed or received written reports from the following named physicians and chiropractors. Affiant believes that the in-court testimony of these witnesses is essential to the proper presentation by defendant of its defense to Mr. Filbrun's purported cause of action. The names and addresses of the physicians and chiropractors, together with the substance of their expected testimony are:

(1) Richard C. Boelkins, M.D.
125-127 Fountain Street N.E.
Grand Rapids, Michigan

Dr. Boelkins is expected to testify that he is a physician specializing in industrial medicine; that on October 18, 1960, and November 12, 1960, he saw Jack J. Filbrun professionally and treated him for alleged injuries arising out of an accident which occurred on July 15, 1960 at Ludington, Michigan. He took a medical history, examined Mr. Filbrun's back, ordered x-rays of the cervical and dorsal spine. The x-rays revealed no significant findings. In Dr. Boelkin's opinion, Filbrun had no signs of any injury.

Dr. Boelkin states that he would be unable to leave his practice for the time required to testify in Chicago. He states, however, that he would be able to testify concerning this matter in Grand Rapids, Michigan.

(2) I. J. Iverson, Chiropractor
909 South Washington Avenue
Ludington, Michigan

Dr. Iverson is expected to testify that he saw Filbrun [fol. 58] professionally on September 24, 26, 29, October 20 and November 7, 1960. Filbrun explained that he had fallen from a flat-car in July, 1960. Dr. Iverson could find nothing specific except some muscular tension. He recommended that Filbrun seek psychiatric help.

Dr. Iverson would be unable to leave his practice in Ludington, Michigan for the time required to testify in Chicago. He would be willing to testify concerning this matter in Grand Rapids, Michigan.

(3) John R. Carney, M.D.
202 N. Park Street
Ludington, Michigan

Dr. Carney is expected to testify that he saw Filbrun on August 8, 1960, again late in August, 1960, on September 13, 1960, and also about one week later. Filbrun complained of pain in the left flank and pyuria. He was given azogantrisin with prompt clearing of the infection. On September

13, 1960, and approximately a week later, Filbrun had a reoccurrence of the pyuria and again had a left pyeloneaphritis. He was given furadantin. The next week the urine was clear again, but he still complained of pain. An IVP was done and it was negative.

Dr. Carney would be unable to leave his practice for the time required to testify in Chicago. He indicates that he would be available to testify concerning this matter in a court in Grand Rapids, Michigan.

[fol. 59]

(4) D. P. Moore, M.D.
Radiology
50 College S. E.
Grand Rapids 3, Michigan

Dr. Moore is expected to testify that on November 12, 1960, at the reference of Dr. Boelkins, he examined x-rays of the cervical and dorsal spine region of Jack Filbrun. No evidence of osseous injury to the spine was observed. The intervertebral disc spaces were maintained. There was no abnormality in the upper dorsal or cervical spine, and none in the lower dorsal spine except for some mild hypertrophic lipping.

Dr. Moore states he would be unable to leave his practice for the time required to testify in Chicago. He states that he would be able to testify concerning this matter in Grand Rapids, Michigan.

(5) E. T. Kruse, Chiropractor
388 First Street
Manistee, Michigan

Dr. Kruse is expected to testify that he saw Filbrun on November 21, 28 and December 5, 1960. Filbrun complained of lower back pain and an examination revealed a lumbo sacral strain which was a routine condition. The condition responded satisfactorily and appeared corrected.

Dr. Kruse states that he would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Grand Rapids, Michigan.

[fol. 60]

(6) Dr. F. W. Sutter, M.D.
Ludington,
Michigan

Dr. Sutter is expected to testify that he saw Mr. Filbrun on several different dates following his injury on July 15, 1960. In his opinion Filbrun suffered back muscle bruising and strain and was released to return to work on August 31, 1960.

Dr. Sutter would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Grand Rapids, Michigan.

(7) Robert R. Garnau, M.D., Radiology
Paulina Stearns Hospital
Ludington, Michigan

Dr. Garnau is expected to testify that on September 20, 1960, at the request of Dr. J. Carney, he performed an x-ray examination of the abdomen of Jack Filbrun. No calculi were noted in the region of the urinary collecting systems to suggest a renal or ureteral calculi. The soft tissue shadows of the psoas muscles and kidney outlines were not abnormal. No abnormalities of the bony structures were noted. The test was negative.

Dr. Garnau would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Grand Rapids, Michigan.

W. Harold Wallace

Subscribed and sworn to before
me, a Notary Public authorized
to take oaths in the State of
Michigan, this day of ,
1961.

.....
Notary Public
My commission expires:

[fol. 61]

EXHIBIT I TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

NO. 61 C 1174

JACK J. FILBRUN,

Plaintiff.

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

COUNTER-AFFIDAVIT BY PLAINTIFF IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER

Keith E. Roberts, being first duly sworn, on oath deposes and says:

1. That affiant is a member of the law firm of HENSLEE & HENSLEE and is handling the instant cause on behalf of plaintiff. That acting in said capacity affiant has reviewed his investigative and medical file and on that basis submits this affidavit.

2. That following his accident and injury on July 15, 1960, plaintiff was examined by a succession of doctors, most of whom were selected by and/or compensated by defendant; that said doctors advised plaintiff that they could find nothing seriously wrong with him.

3. That on or about December 20, 1960, plaintiff came to the office of affiant seeking legal advice and competent medical care from an orthopedic specialist not affiliated or associated with a railroad company.

[fol. 62] 4. That on or about December 20, 1960, affiant arranged for an examination of plaintiff by a competent orthopedic specialist, G. J. Rabin, in Chicago. That as a result of that examination Dr. Rabin concluded and would so testify that plaintiff sustained a serious injury to the neck and lower back and recommended that plaintiff be hospitalized for conservative treatment.

5. That on January 17, 1961, plaintiff was admitted to Alexian Brothers Hospital in Chicago with acute pain in the neck with radiating pain and symptomatology down the left upper extremity and acute pain in the low back radiating down the lower extremities, that during said period of hospitalization plaintiff was placed in cervical and pelvic traction and was given an intensive course of physiotherapy and anti-spasmodic medication; that on or about February 3, 1961, plaintiff was discharged from said hospital.

6. That on February 17, 1961, plaintiff was readmitted to Alexian Brothers Hospital where a myelographic study was performed revealing a ruptured intervertebral defect; that on February 23, 1961, a laminectomy and spinal fusion was performed by G. J. Rabin, M. D. at which time a large ruptured intervertebral disc between L-5 and S-1, which was causing compression of the spinal cord, was removed; that plaintiff was fitted with a torso spica cast and discharged from the hospital on March 3, 1961.

7. That in the trial of this cause the doctor most competent to testify concerning the myelographic study and surgery performed upon plaintiff is G. J. Rabin, M. D.; that to induce said doctor to appear in Ludington or Grand Rapids, or elsewhere in Michigan, would require an expenditure by plaintiff of a minimum of $1,000.00; that arrangements can be made to have Dr. Rabin testify in this [fol. 63] court without causing him to forego any of the surgery customarily performed by said doctor five or six days per week.

8. That should defendant make any issue as to the condition, care or treatment of plaintiff, it would be necessary for plaintiff to produce as witnesses the roentgenologist, assisting surgeon, nurses, anesthetist and therapists at

Alexian Brothers Hospital who assisted in the care and treatment of plaintiff; that said witnesses, five or more in number could much more readily, more conveniently and less expensively be produced in Chicago than in a foreign jurisdiction; that the estimated cost to the plaintiff of producing said witnesses in a foreign jurisdiction would be approximately $1,500.00.

9. That to date plaintiff has incurred medical expenses in Chicago in the amount of $1,425.00 and hospital expenses in Chicago in the amount of $1,066.60; that plaintiff is now and hereafter will continue to be under the care of Dr. Rabin for a period of many months.

10. That to relieve defendant of any unnecessary expense plaintiff will produce the testimony of all occurrence witnesses in Chicago at plaintiff's expense.

KEITH E. ROBERTS

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Subscribed and sworn
to before me this 12th day
of September, 1961.

.....
Notary Public

[fol. 64]
STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

AFFIDAVIT OF JACK J. FILBRUN

JACK J. FILBRUN, being first duly sworn, on oath deposes and says:

I live at 414 North Lewis Street, Ludington, Michigan with my wife and five children and that I am thirty-nine years old.

I have been employed by the Chesapeake and Ohio Railway Company as a switchman since 1953.

On July 15, 1960, at about 8:15 P.M., I suffered an injury to my side, neck and back when, while attempting to release a hand brake on a box car (CN521723), the brakes suddenly released causing me to fall to the ground.

Following the injury, I was taken by ambulance to Paulina Stearns Hospital in Ludington, Michigan. I was seen there that night by Dr. Sutter, the company doctor. X-rays were taken of my left side. I was badly shaken and they gave me a shot to calm my nerves. I was kept in the hospital for two weeks and was given many pills but no therapy other than being encouraged to walk. Throughout that period, Dr. Sutter was the treating doctor and he told me simply that I had a bad bruise.

Following the hospitalization, I remained at home two more weeks, and then Dr. Sutter ordered me back to work. At that time, I was still having pain in my back just as I had when I first went into the hospital. In fact, I was hardly able to walk into his office. About two days later, I returned to work. I continued to work off and on with a lot of pain.

After seeing Dr. Sutter on several occasions and getting no relief, on my own I went to see a Dr. Iverson, a chiropractor. His treatments gave me relief for about thirty minutes. So I then went to Supt. Gibson and asked him for additional medical treatment. I was sent to Dr. Richard Boelkens by the company. He took x-rays of my neck and back but gave me no treatment. I then saw another chiro-

practor, Dr. E. T. Kruse. I got no help from that source either.

[fol. 65] Finally, as a last resort, not knowing of any specialist in my area, I asked the company by a letter to Dr. Boelkens if he would refer me to a specialist. Dr. Boelkens had told me that if I continued to have trouble to write him and he would refer me to a orthopedic surgeon or a neurologist. On November 16, 1960, Dr. Boelkens wrote me saying that there was no evidence of disease or injuries to cause me any anxiety. On November 17, 1960, he again wrote me and told me that my request for examination by a specialist had been referred to the railroad claim department.

Neither the claim department or the medical department ever granted me that request to see a specialist. Instead, the railroad sent Claim Agent Collins to my home. He told me their medical reports indicated that there was nothing wrong with me and he tried to settle my case. He offered to pay me in full settlement of my case $1,010.36 and to repay sick benefits to the railroad retirement board in the amount of $357.00. Actually, at that time, I figured that my lost wages and expenses were greater than that. I refused to settle with him at that time on that basis because he didn't offer enough money and because I knew that I needed more medical attention which the company refused to furnish.

At that point which was about the middle of December, 1960, I decided that I needed legal advice to help me settle my claim and as I said before, I needed medical help from some one, some where. I wrote a letter following the claim agent's visit to the office of Henslee & Henslee in Chicago who are the legal counsel for my union, the Brotherhood of Railroad Trainmen. In that letter, I asked them to consider representing me. On December 16, Mr. Roberts of that office wrote to me and gave me an appointment for December 20, 1960.

I had known of Henslee & Henslee for several years before my accident because they handled cases against the C&O for other employees who had been injured on the job. I did consider hiring one lawyer in Ludington but I was told he did work for the C&O. I also felt that the counsel

[fol. 66] for the trainmen would do the best job because of their experience in my kind of case.

When I saw Mr. Roberts in Chicago on December 20th, he agreed to handle my case and after I explained to him the trouble I was having with my back and neck, he referred me to Dr. Rabin, an orthopedic surgeon. Later on, I was hospitalized and placed in traction and finally had an operation on my back in February.

I have tried to go back to work but the company doctor won't let me do so yet. Dr. Rabin thinks that I should be given a chance to do my work to see if I can do it and I am going back to work just as soon as the company will let me.

I felt that before getting legal advice that I should try to settle the case myself but I did not feel that their offer was fair. Also, if they had sent me to a specialist as I requested, and I really would have preferred getting medical care closer to home so that I could have been closer to my wife and children.

JACK J. FILBRUN

Subscribed and sworn to before me
this 1st day of December, 1961.

.....
Notary Public

[fol. 67]

EXHIBIT J TO PETITION FOR MANDAMUS

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURT HOUSE
CHICAGO 4

Date: Dec. 15, 1961

Re:

JACK J. FILBRUN

vs.

THE CHESAPEAKE & OHIO RWY CO.

Case No. 61 C 1174

You are hereby notified that Judge Parsons entered the following order on 12-7-61:

Motion of deft to transfer cause denied, and answer to complaint to be filed by Jan. 8, 1962

ROY H. JOHNSON, Clerk

ht

[fol. 68]

EXHIBIT K TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 61 C 1174

JACK J. FILBRUN,

Plaintiff,

v.

THE CHESAPEAKE & OHIO RAILWAY,
a corporation,

Defendant.

PETITION BY DEFENDANT FOR REHEARING OF MOTION TO TRANSFER AND MOTION TO VACATE ORDER DENYING MOTION TO TRANSFER

Now comes defendant, The Chesapeake & Ohio Railway Company, by Charles J. O'Laughlin, Holland C. Capper, and Thompson, Raymond, Mayer & Jenner, its attorneys, and petitions this Court for a rehearing of defendant's motion to transfer; for the entry of an order vacating this Court's order of December 7, 1961, which denied defendant's motion to transfer; and for the entry of an order transferring this action to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

As grounds for this petition and motion, defendant states that this Court was not sufficiently apprised of the effect of the order entered May 15, 1961, by the Honorable Thomas E. Kluczynski, a Judge of the Circuit Court of Cook [fol. 69] County, Illinois, which dismissed the identical action now pending before this Court between the identical parties, on the ground that the Circuit Court of Cook

County, Illinois, was an inconvenient and inappropriate forum.

For these reasons, defendant has prepared a comprehensive memorandum of law, attached to this petition, which fully presents and supports defendant's position that plaintiff was bound by the order of the Circuit Court of Cook County, Illinois, which held that an Illinois forum was an inconvenient and inappropriate place for the trial of this action, and could not relitigate that same issue by filing an identical lawsuit in this Court, located approximately six blocks from the Illinois State Court which had so held.

For these reasons, defendant prays that this Court reconsider defendant's motion to transfer, and upon such reconsideration, that it vacate its order denying said motion, grant the motion, and enter an order transferring the above entitled action to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

By .....

.....

Its Attorneys

Thompson, Raymond,
Mayer & Jenner
135 S. LaSalle St.
Chicago 3, Illinois
RAndolph 6-0220
Of counsel

[fol. 70]

EXHIBIT L TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 61 c 1174

JACK J. FILBRUN,

Plaintiff,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
a corporation,

Defendant.

ORDER

This cause coming on to be heard upon rehearing of defendant's motion to transfer pursuant to section 1404(a) of the Judicial Code, and both parties having submitted briefs and the Court having heard the arguments of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED:

(1) That so much of the Order of February 9, 1962, as vacated the Order of December 7, 1961, denying defendant's motion to transfer be, and it is hereby set aside.

(2) That on rehearing defendant's motion to transfer pursuant to section 1404(a) of the Judicial Code be, and it is hereby denied.

ENTER:

March 20, 1962

.....
JUDGE

[fol. 71]

DOCKET ENTRIES

ORIGINAL PETITION FOR A WRIT OF MANDAMUS

Case No. 13701

CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

vs.

HON. JAMES B. PARSONS, Judge, United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

DATE	APPELLANT'S ACCOUNT	RECEIVED	DISBURSED
4/12/62	Thompson, Raymond, Mayer & Jenner	$25.00	
4/19/62	Costs		$25.00
		$25.00	$25.00

[fol. 72]

DATE	FILINGS—PROCEEDINGS
4/12/62	Docketed cause.
4/12/62	Filed original and 3 copies of Petition for Writ of Mandamus.
4/12/62	Filed 4 printed copies of a brief in support.
4/14/62	Filed appearance for the petitioner (C. J. O'Laughlin).
4/17/62	Entered Rule to Show Cause, returnable in 20 days.
4/17/62	Issued certified copy of Rule to Show Cause to respondent and his counsel.
4/18/62	Filed Clerk's proof of service of Petition for Writ of Mandamus and brief in support.

DATE	FILINGS—PROCEEDINGS
4/28/62	Filed letter from Judge Parsons that he approves of appointment of J. J. Naughton as his (respondent's) attorney.
5/ 1/62	Filed appearance for the respondent (J. J. Naughton).
5/ 4/62	Filed original and 3 copies of Answer to Petition for Writ of Mandamus.
5/ 7/62	Filed 4 copies of brief of respondent in support of Answer.
5/ 8/62	Entered order that this cause be added to the calendar and set down for oral argument on Tuesday, June 7, 1962.
5/21/62	Filed 30 copies of petitioner's reply brief.
6/ 7/62	Heard and taken under advisement.
6/27/62	Filed opinion by Castle, C. J.; concurring opinion by Major, C. J.; and dissenting opinion by Schnackenberg, C. J.
6/27/62	Entered judgment denying the Petition for Writ of Mandamus.
6/27/62	Issued certified copy of final decree of June 27, 1962 to counsel, respondent and Clerk, U. S. District Court.
7/11/62	Filed 30 copies of petitioner's Petition for Rehearing.
7/20/62	Filed 30 copies of respondent's Answer to Petition for Rehearing.
9/ 7/62	Filed opinion by Schnackenberg, C. J.; dissenting opinion by Castle, C. J.
9/ 7/62	Entered judgment that a Writ of Mandamus issue directing Hon. James B. Parsons to transfer cause from U. S. District Court for the Northern District of Illinois, Eastern Division, to the U. S. District Court for the Western District of Michigan, Southern Division, at Grand Rapids.

DATE	FILINGS—PROCEEDINGS
9/13/62	Issued certified copy of final order (decree) of September 7, 1962 to Clerk, U. S. District Court, Chicago, Judge Parsons and counsel.
9/21/62	Filed 30 copies of respondent's Petition for Rehearing.
10 /2/62	Filed 30 copies of petitioner's Answer to Petition for Rehearing.
[fol. 73]	Caption
[fol. 74]	
10/ 4/62	Entered order denying Petition for Rehearing.
10/ 4/62	Issued certified copy of denial of Petition for Rehearing dated October 4, 1962, to counsel, Clerk, U. S. District Court, Chicago and Judge Parsons.
10/11/62	Filed original and 4 copies of motion to recall decree and order denying rehearing issued to U. S. District Court, service.
10/23/62	Entered order granting a 30 day stay of execution (from October 4, 1962) of this Court's judgment of Mandamus entered on September 7, 1962; if within such time the Clerk of this Court receives a certificate from the Clerk of the Supreme Court of the United States that Certiorari Petition, Record and brief have been filed, then this stay shall be continued until final disposition by the Supreme Court.
10/23/62	Issued certified copy of order of October 23, 1962 to Clerk, U. S. District Court, Chicago, Judge Parsons and counsel.

[fol. 75]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[Title omitted]

RULE TO SHOW CAUSE—April 17, 1962

This matter comes before the Court on the petition of counsel for the Chesapeake and Ohio Railway Company, filed herein on April 12, 1962, for a writ of mandamus to direct respondent to transfer the cause entitled Jack J. Filbrun, Plaintiff v. The Chesapeake and Ohio Railway Company, a corporation, Defendant, No. 61 C 1174, to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

On consideration whereof, It Is Hereby Ordered that respondent show cause, if any there be, why a writ of mandamus should not issue as prayed for in said petition by filing in the office of the Clerk of this Court an original and five (5) copies of his response to this Rule within twenty (20) days from this date.

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ANSWER TO ORIGINAL PETITION FOR WRIT OF MANDAMUS—Filed May 4, 1962

To the Honorable Justices of the United States Court of Appeals for the Seventh Circuit:

Respondent, James B. Parsons, United States District Judge, by John J. Naughton, his attorney, for Answer to the Petition for Writ of Mandamus, says:

1. Respondent admits the allegations contained in Paragraphs 1 to 9 inclusive.

2. Respondent states that the Motion was taken on Briefs by the Honorable Julius J. Hoffman, United States District Judge. While the matter was under advisement, Petitioner,

on September 25, 1961 wrote Judge Hoffman a letter, a copy of which is attached hereto as Exhibit M in this action.

3. Respondent admits the allegations contained in Paragraph 10. Respondent further states that the Petitioner's [fol. 77] Motion was orally argued before him and that the Motion was taken under advisement on that argument on the Briefs previously filed, and on the Affidavits of the parties.

4. Respondent admits the allegations contained in Paragraph 11.

5. Respondent states that on January 10, 1962, Petitioner filed its Answer, a copy of which is hereto attached as Exhibit O in this action.

6. Respondent admits the allegations contained in Paragraph 12. Respondent further states that a Rehearing was granted the Petitioner; that oral argument was heard on that Rehearing; that Briefs were filed by the parties and that Affidavit of Plaintiff was filed on March 1, 1962 contemporaneously with the filing of the Plaintiff's Brief on Rehearing. On this Rehearing, Respondent again took the matter under advisement on all the papers filed on the Motion to Transfer.

7. Respondent admits the allegations contained in Paragraph 13.

8. Respondent denies each and every allegation contained in Paragraph 14 except that Respondent admits the factual allegations contained in sub Paragraphs 1, 2 and 7 of Paragraph 14 of the Petition. Respondent states that he carefully considered the Motions, the Affidavits, the Oral Arguments and the Briefs filed concerning the Petitioner's request for transfer, and that he decided that the Petitioner had failed to meet its burden of establishing that a transfer would be for the convenience of the parties and witnesses [fol. 78] and in the interests of justice. Respondent further states that he made a finding that he was not required to give full faith and credit to the judgment of the Circuit Court of Cook County which, in its discretion, dismissed the Plaintiff's Complaint.

WHEREFORE, Respondent requests that this Honorable Court refuse to issue a writ of mandamus directing him to transfer the Plaintiff's cause of action to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

Respectfully submitted,

JAMES B. PARSONS,
United States District Judge,
Respondent

By JOHN J. NAUGHTON
John J. Naughton
139 N. Clark Street
Chicago 2, Illinois
STate 2-5925
Attorney for Respondent

[fol. 79]

EXHIBIT M TO ANSWER TO PETITION FOR MANDAMUS

September 25, 1961

Honorable Julius Hoffman
United States District Court
United States Court House
Chicago, Illinois

Re: Filbrun v. The Chesapeake and Ohio Railway Company—No. 61 C 1174

Dear Judge Hoffman:

I am in receipt of a memorandum submitted by the plaintiff in the above entitled matter, and although the order of the Court fixing the time for filing briefs did not provide for a reply brief, I am taking the liberty of writing you with the hope that you might find some of my thoughts on the plaintiff's brief meritorious.

Undisputed is the fact that seven doctors and the plaintiff reside close to the United States District Court in Grand Rapids. One witness resides close to the United States District Court in Chicago. Plaintiff, not unexpectedly, believes

that one witness, his witness, has more valuable testimony to submit in that he performed an operation upon the plaintiff. Defendant, also not unexpectedly, believes that the seven doctors who examined and treated plaintiff have equally, if not more valuable testimony to submit, in that they believed surgery was not, necessary. Equally, roentgenologists and assistants may be required to be produced by defendant to the same extent as plaintiff believes similar assistants might have to be produced by him. These factors do not militate for a different conclusion than the statistics themselves reveal. A trial in Grand Rapids is for the *convenience* of the parties and of the witnesses. No amount of argument can hide this basic fact.

Plaintiff's "offer" to produce testimony of occurrence witnesses in Chicago at his own expense is meaningless. It does not in any way argue for a conclusion different than the one stated above, i.e., a trial in Grand Rapids will be for the convenience of the parties and the witnesses. Besides plaintiff's offer is wholly unenforceable and should receive scant attention from the Court.

Plaintiff argues that the adjudication by the Circuit Court of Cook County, acquiesced in by the parties, to the effect that Chicago is an inconvenient forum, should receive little [fol. 80] weight by this Court, and this because the factors of the doctrine of "forum non conveniens" are not the same as set forth in this statute. (Section 1404(a) of the United States Judicial Code) The only trouble with plaintiff's argument is that the law dealing with *forum non conveniens* is more stringent and the authorization to dismiss more narrow than that found in Section 1404(a). All of the factors which may be considered in an adjudication of an inconvenient forum may be considered under Section 1404(a). The converse, however, is not true. This is true, of course, because under the doctrine of *forum non conveniens* the case is dismissed, whereas as under Section 1404(a) the case is merely transferred.

It is respectfully submitted that plaintiff has wholly failed to show that a transfer to the United States District Court for the Western District of Michigan, Southern Division,

sitting in Grand Rapids, would not be for the convenience of the parties and of the witnesses.

Respectfully submitted,

CHARLES J. O'LAUGHLIN

CJO:ax
cc: Mr. Keith Roberts

[fol. 81]

EXHIBIT O TO ANSWER TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANSWER

Now comes The Chesapeake and Ohio Railway Company, a corporation, defendant, and for answer to the complaint of plaintiff, states as follows:

1. Defendant admits the allegations of paragraph 1.
2. Defendant admits the allegations of paragraph 2.
3. Defendant admits the allegations of paragraph 3.
4. Defendant admits the allegations of paragraph 4.
5. Defendant admits the allegations of paragraph 5.
6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 6.
7. Defendant denies the allegations of paragraph 7.
8. Defendant denies the allegations of paragraph 8.

[fol. 82] WHEREFORE, defendant prays that the complaint of plaintiff be dismissed and that it have judgment for its costs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

By: Charles J. O'Laughlin
Holland C. Capper
Its Attorneys

THOMPSON, RAYMOND, MAYER, JENNER & BLOOMSTEIN

135 S. LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 83]

EXHIBIT P TO ANSWER TO PETITION FOR MANDAMUS

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*:

AFFIDAVIT OF JACK J. FILBRUN

JACK J. FILBRUN, being first duly sworn, on oath deposes and says:

I live at 414 North Lewis Street, Ludington, Michigan with my wife and five children and that I am thirty-nine years old.

I have been employed by the Chesapeake and Ohio Railway Company as a switchman since 1953.

On July 15, 1960, at about 8:15 P.M., I suffered an injury to my side, neck and back when, while attempting to release a hand brake on a box car (CX521723), the brakes suddenly released causing me to fall to the ground.

Following the injury, I was taken by ambulance to Paulina Stearns Hospital in Ludington, Michigan. I was seen there that night by Dr. Sutter, the company doctor. X-rays were taken of my left side. I was badly shaken and they gave me a shot to calm my nerves. I was kept in the hospi-

tal for two weeks and was given many pills but no therapy other than being encouraged to walk. Throughout that period, Dr. Sutter was the treating doctor and he told me simply that I had a bad bruise.

Following the hospitalization, I remained at home two more weeks, and then Dr. Sutter ordered me back to work. At that time, I was still having pain in my back just as I [fol. 84] had when I first went into the hospital. In fact, I was hardly able to walk into his office. About two days later, I returned to work. I continued to work off and on with a lot of pain.

After seeing Dr. Sutter on several occasions and getting no relief, on my own I went to see a Dr. Iverson, a chiropractor. His treatments gave me relief for about thirty minutes. So I then went to Supt. Gibson and asked him for additional medical treatment. I was sent to Dr. Richard Boelkens by the company. He took x-rays of my neck and back but gave me no treatment. I then saw another chiropractor, Dr. E. T. Kruse. I got no help from that source either.

Finally, as a last resort, not knowing of any specialist in my area, I asked the company by a letter to Dr. Boelkens if he would refer me to a orthopedic surgeon or a neurologist. On November 16, 1960, Dr. Boelkens wrote me saying that there was no evidence of disease or injuries to cause me any anxiety. On November 17, 1960, he again wrote me and told me that my request for examination by a specialist had been referred to the railroad claim department.

Neither the claim department or the medical department ever granted me that request to see a specialist. Instead, the railroad sent Claim Agent Collins to my home. He told me their medical reports indicated that there was nothing wrong with me and he tried to settle my case. He offered to pay me in full settlement of my case $1,010.36 and to repay sick benefits to the railroad retirement board in the amount of $357.00. Actually, at that time, I figured that my [fol. 85] lost wages and expenses were greater than that. I refused to settle with him at that time on that basis because he didn't offer enough money and because I knew that I needed more medical attention which the company refused to furnish.

At that point which was about the middle of December, 1960, I decided that I needed legal advice to help me settle my claim and as I said before, I needed medical help from some one, some where. I wrote a letter following the claim agent's visit to the office of Henslee & Henslee in Chicago who are the legal counsel for my union, the Brotherhood of Railroad Trainmen. In that letter, I asked them to consider representing me. On December 16, Mr. Roberts of that office wrote to me and gave me an appointment for December 20, 1960.

I had known of Henslee & Henslee for several years before my accident because they handled cases against the C. & O. for other employees who had been injured on the job. I did consider hiring one lawyer in Ludington but I was told he did work for the C. & O. I also felt that the counsel for the trainmen would do the best job because of their experience in my kind of case.

When I saw Mr. Roberts in Chicago on December 20th, he agreed to handle my case and after I explained to him the trouble I was having with my back and neck, he referred me to Dr. Rabin, an orthopedic surgeon. Later on, I was hospitalized and placed in traction and finally had an operation on my back in February.

[fol. 86] I have tried to go back to work but the company doctor won't let me do so yet. Dr. Rabin thinks that I should be given a chance to do my work to see if I can do it and I am going back to work just as soon as the company will let me.

I felt that before getting legal advice that I should try to settle the case myself but I did not feel that their offer was fair. Also, if they had sent me to a specialist as I requested, I really would have preferred getting medical care closer to home so that I could have been closer to my wife and children.

.....

JACK J. FILBRUN

Subscribed and sworn to before me
this 1st day of December, 1961

.....

Notary Public

[fol. 87]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1961—APRIL SESSION, 1962

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

OPINION—June 27, 1962

Before Schnackenberg, Castle and Major, *Circuit Judges.*

CASTLE, *Circuit Judge.* This is a petition for a writ of mandamus to compel the respondent to transfer, pursuant to the provisions of 28 U.S.C.A. §1404(a),[1] a cause entitled *Jack J. Filbrun* v. *The Chesapeake & Ohio Railway Company*, Civil No. 61 C 1174, from the United States District Court for the Northern District of Illinois, Eastern Division, to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan. A rule was issued on the respondent to show cause why the writ should not issue and [fol. 88] the matter is now before us for consideration on the petition, the respondent's answer thereto, including the exhibits attached to each, and the briefs and arguments of the respective parties.

[1] 28 U.S.C.A. §1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Filbrun's action against the petitioner railroad is a Federal Employers' Liability Act action for injuries alleged to have been received in a fall from a box car caused by a sudden release of a handbrake he was operating. Prior to its commencement in the District Court a substantially identical action filed by Filbrun against the petitioner in the Circuit Court of Cook County, Illinois, was dismissed on the railroad's motion on the ground that the Circuit Court of Cook County "is an inconvenient and inappropriate forum". Filbrun did not appeal that determination. He filed the District Court action and petitioner's motion for its transfer to the Western District of Michigan, Southern Division, pursuant to 28 U.S.C.A. §1404(a) was denied by respondent.

The contested issues presented for our determination are:

> (1) Whether the state court's determination, made under the *forum non conveniens* doctrine, estops Filbrun from maintaining his action in a court sitting in Cook County, Illinois, and requires the District Court to allow the petitioner's motion to transfer the action to the Western District of Michigan, Southern Division; and if it does not,
>
> (2) Whether, on the facts and circumstances presented, it is clearly established that the respondent's denial of the transfer sought constitutes an abuse of discretion.

The state Court's determination was an application of the *forum non conveniens* doctrine. This required consideration of the same relevant factors as those to be considered in applying §1404(a) (*Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32) plus an additional and more stringent factor required by the Illinois decision governing the doctrine's application to F.E.L.A. cases (*Cotton* v. *Louisville and Nashville Railroad Company*, 14 Ill. 2d 144, 174, 152 N.E. 2d 385) that "only where it is shown that plaintiff is motivated purely by vexation and harassment will an F.E.L.A. case be dismissed" thereunder. Petitioner urges that because the state [fol. 89] court's determination required consideration of all factors relevant to an application of §1404(a) every point and question necessary to be passed upon in connection with

its motion to transfer has already been adjudicated adversely to Filbrun. From this premise petitioner argues that Filbrun is estopped from relitigating those matters and that the full faith and credit provisions of 28 U.S.C.A. §1738 require respondent to allow petitioner's motion to transfer.

The flaw in petitioner's contentions is that although the factors relevant to consideration of a motion to transfer under §1404(a)—matters bearing on the convenience of the parties and witnesses, and the interest of justice—are all also relevant areas of inquiry, consideration of which is pertinent and necessary to a determination of the applicability of the *forum non conveniens* doctrine, those factors do not in the instant case involve identical material factual issues. Petitioner's contentions on this phase of the case confuse the ultimate conclusion and determination of the state court that it "is an inconvenient and inappropriate forum" with the material factual issues involved in that determination. A factual issue in the state court proceeding was whether the availability of a state forum at Ludington, Michigan (the county seat of Mason County) where the incident occurred, and where Filbrun and most of the witnesses resided,[2] as well as the availability of a federal forum at Grand Rapids, Michigan, within some sixty miles of Ludington, when considered in the light of all other pertinent factors established that Filbrun's selection of the Circuit Court of Cook County at Chicago, Illinois, some three hundred miles from Ludington, was dictated purely by a desire to vex and harass the petitioner. But in resolving the issues involved in the motion to transfer the District Court action to the District Court at Grand Rapids the availability of a state forum at Ludington was not a factor

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[2] Subsequent to the fall, and his treatment and discharge by Ludington medical practitioners, Filbrun was hospitalized in Chicago where a laminectomy and spinal fusion was performed by a Chicago doctor to remedy a ruptured intervertebral disc. This Chicago orthopedic specialist would be Filbrun's chief medical witness. In addition, the medical and hospital records concerning the hospitalization, diagnosis, treatment and surgery are all located at Chicago as well as the roentgenologist and hospital staff who participated therein. Petitioner's occurrence witnesses are its own employees.

which the respondent could consider. He could transfer the [fol. 90] cause to a federal district court only—and the issues before him involved only the comparative convenience or inconvenience, and interest of justice, as measured by a choice between the District Court at Chicago, Illinois, and the District Court at Grand Rapids, Michigan. Thus, at least one material factual consideration was not identical in both proceedings.

The cases relied upon by the petitioner are therefore inapposite. In *Healea* v. *Verne*, 343 Ill. 325. 175 N.E. 562; *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 103 N.E. 227 and *Hicks* v. *Hicks*, 20 Ill. App. 2d 139, 155 N.E. 2d 355, the estoppel recognized and applied, and in *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1 Cir., 284 F. 2d 868, the application of the mandate of 28 U.S.C.A. §1738, was grounded on an attempt to relitigate the *same* material fact or issue which had been the subject of a prior adjudication in an action or proceeding involving the parties.[3]

In the instant case the prior adjudication involved and required consideration of a material fact—the availability of a state court forum at Ludington—which was not subject to consideration in the subsequent proceeding. The test is not whether the same relevant factors or standards were applied in the determination of an issue but whether the same fact or question was determined. The question of the comparative convenience or appropriateness of the Ludington forum over a Chicago forum is not the same as the question of such relationship between a Grand Rapids forum[4] and a Chicago forum. In our opinion the determination of the Circuit Court of Cook County does not estop Filbrun from maintaining his action in the United States District Court for the Northern District of Illinois, Eastern Division, a permissible venue under the Federal Employers' Liability Act (45 U.S.C.A. §56), nor circum-

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[3] See also *Stangle* v. *Chicago, Rock Island and Pacific Railroad Company*, 7 Cir., 295 F. 2d 789, in which this Court approved an application of the doctrine of collateral estoppel.

[4] Except that petitioner is suable there, Grand Rapids has no connection with the action.

scribe the District Court in the exercise of its judgment and discretion in determining petitioner's motion to transfer the cause to Grand Rapids.

This Court recognizes the availability of mandamus as a remedy to rectify a district court's abuse of discretion [fol. 91] in the application of §1404(a). *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378; *Blaski* v. *Hoffman*, 7 Cir., 260 F. 2d 317. But as was pointed out by then Chief Judge, F. Ryan Duffy, "something more must be shown than an erroneous decision by the District Court. We emphasized that an abuse of discretion must clearly appear." *Sypert* v. *Miner*, 7 Cir., 266 F. 2d 196, 199, citing *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, 304.

We have considered the representations made, and reviewed the affidavits tendered with the pleadings, concerning the witnesses who would be called and the nature of the testimony each would give. Without discussing this and the other pertinent factors in detail we deem it sufficient to observe that the respondent's determination of the issues and disposition of the motion involved a balancing of the comparative convenience and inconvenience to the parties and witnesses, and an appraisal of the likelihood of difficulty or expense in the procurement of attendance of witnesses, and the probability of need to resort to the use of depositions, as bearing on the interest of justice. Whether we would have reached the same conclusion is not important. We cannot say that respondent has clearly abused the discretion he was called upon to exercise. Had it not been for the question of first impression precipitated by the estoppel and full faith and credit issues based on the state court determination, the petition for a writ of mandamus would have merited no more than the summary disposition called for by Judge Duffy's admonition in *Sypert* v. *Miner*, *supra*, (p. 199) that:

> "Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases

unless they can make out a strong case of abuse of discretion."

The petition for mandamus is therefore denied.

PETITION DENIED.

[fol. 92] MAJOR, *Circuit Judge*, concurring. I concur in the result reached by Judge Castle, that is, that the petition for mandamus should be denied. As the parties state in their briefs, the question as to what, if any, effect respondent should have attributed to the state court judgment is one of first impression. Under the circumstances, I desire briefly to state my views in the matter.

It is my opinion that neither the doctrine of *res judicata* nor that of estoppel by verdict is applicable. Absent a case precisely in point, reason and logic support that view. The doctrine of forum *non conveniens* is quite different from Sec. 1404 (a). *Norwood et al.* v. *Kirkpatrick*, 349 U.S. 29, 31. In the same case, page 32, the court recognized that the transfer section was applicable "whether dismissal under the doctrine of forum *non conveniens* would have been appropriate or not."

The transfer provision places squarely upon the district court the duty to decide whether a transfer is for the convenience of parties and witnesses and in the interest of justice. I do not believe that a district court can be stripped of the authority and power so specifically bestowed, by the action of a state court under the doctrine of forum *non conveniens*, recognizable in a state court but superseded in a federal court by the enactment of Sec. 1404 (a).

As I understand, *res judicata* or estoppel by verdict constitute a bar to any further proceeding. Either doctrine, if applicable, would have been conclusive and respondent would have had nothing further to consider or decide. The convenience of parties and witnesses and the interest of justice would have been of no concern to him because those questions had been determined by a state court. Moreover, the plain language of the transfer statute would not require or permit a transfer on the basis of the applicability of either doctrine. Admittedly, the filing of the same action by

the plaintiff in another state court would have been subject to dismissal. It seems to me that the same result, not a transfer, would be required in a federal district court, which is one of concurrent jurisdiction with the state court in actions such as the one involved.

[fol. 93] I agree with the reasoning of Judge Castle from which he reaches the conclusion that there was no abuse of discretion on the part of respondent in his refusal to grant a transfer.

SCHNACKENBERG, *Circuit Judge*, dissenting.

Plaintiff selected the Circuit Court of Cook County, Illinois, in which to first file his personal injury suit against defendant railroad, based on alleged injuries sustained by him at Ludington, Mason County, Michigan, which is about 60 miles from Grand Rapids, where a United States District Court sits. Respondent is a judge of the United States District Court which sits in Chicago, in Cook County, Illinois.

The jurisdiction of the district courts in federal employers' liability cases is concurrent with that of the state courts. 45 U.S.C.A. § 56.

On motion of defendant, the state court dismissed plaintiff's action on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum. It also denied plaintiff's motion for reconsideration of its action. Plaintiff took no appeal from either order. Instead, plaintiff's suit on the same cause of action was filed in the same city and county of Illinois but in the United States District Court.

The dismissal in the Illinois state court was based upon the doctrine of *forum non conveniens*. Respondent was required by 28 U.S.C.A. § 1738 to give full faith and credit to the order entered by the state court. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F.2d 868, 870. This is especially true because it is a court of concurrent jurisdiction in administering the Federal Employers' Liability Act, as provided in that act, *supra*. Certainly if plaintiff had refiled his action in any state court in

Cook County, it would have been dismissed on the basis of the Circuit Court's dismissal.

There is an additional reason why the district court should have transferred the case to the federal court at Grand [fol. 94] Rapids, Michigan. In applying the doctrine of *forum non conveniens*, the state court, pursuant to Illinois law, applied all of the tests set forth in 28 U.S.C.A. § 1404 (a), which are (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice. In applying that doctrine the state court was required additionally to determine whether plaintiff's selection of that court was dictated by a desire to vex and harass the petitioner. While it so held, that fact is immaterial here because the district court did not have to wrestle with that question. Plaintiff was, however, bound by the doctrine of estoppel by verdict,[1] because, on all of the other tests applied by the state court, its decision was adverse to plaintiff. These matters were again raised before the district court under § 1404 (a). Confronted by a final decision thereon by a court of concurrent jurisdiction, the district court had no discretion but to recognize the authoritative value of the state court's ruling, made in a case commenced there by plaintiff.

These reasons are sufficient upon which to grant the issuance of the writ requested. The transfer of this case to the federal district court 60 miles from plaintiff's home and the scene of his accident, and where many of the witnesses are available to both litigants, all combine to establish that justice would there be accomplished.

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[1] In *Stangle* v. *Chicago, Rock Island and Pacific R. R. Co.*, 295 F.2d 789, 791, we referred to a statement in regard to "estoppel by verdict" announced in *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N.E. 2d 281, 285, as follows:

"• • • 'estoppel by verdict or judgment, is but another branch of the doctrine of *res judicata*, and rests on the same principles as *res judicata*' • • • ".

[fol. 95]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. J. Earl Major, Circuit Judge.

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

vs.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

JUDGMENT DENYING PETITION FOR MANDAMUS—June 27, 1962

This matter comes before the Court on the petition of The Chesapeake and Ohio Railway Company for a writ of mandamus, the answer of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the said petition of The Chesapeake and Ohio Railway Company for a writ of mandamus be, and the same is hereby Denied, in accordance with the opinion of this Court filed this day.

[fol. 96]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1962—SEPTEMBER SESSION, 1962

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
a Virginia corporation, Petitioner,

v.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

OPINION ON REHEARING—September 7, 1962

Before Schnackenberg, Castle and Major, Circuit Judges.

SCHNACKENBERG, *Circuit Judge.* On June 27, 1962 we filed an opinion and entered an order denying the petition of The Chesapeake & Ohio Railway Company, a Virginia corporation, praying for a writ of mandamus to compel the Honorable James B. Parsons, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, named as respondent, to transfer, pursuant to the provisions of 28 U. S. C. A. § 1404(a),[1] a cause entitled *Jack J. Filbrun*[2] v. *The Chesapeake & Ohio Railway Com-*
[fol. 97] *pany*, Civil No. 61 C 1174, from that court to the United States District Court for the Western District of

[1] 28 U. S. C. A. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[2] Filbrun is also referred to herein as "plaintiff".

Michigan, Southern Division, sitting at Grand Rapids, Michigan.

Upon petition for rehearing, we have ordered said opinion withdrawn and all orders entered pursuant thereto vacated and set aside.

A rule having been issued directing the respondent to show cause why a writ should not issue, the matter is now before us for consideration on the petition for a writ of mandamus, the respondent's answer thereto, including the exhibits attached to each, and the briefs and arguments of the respective parties, as well as the petition for rehearing and respondent's answer thereto, from all of which the following controlling facts appear:

> Filbrun's action against the petitioner railroad is a Federal Employers' Liability Act action for injuries alleged to have been received in a fall from a box car caused by a sudden release of a handbrake he was operating. Prior to its commencement in the District Court a substantially identical action filed by Filbrun against the petitioner in the Circuit Court of Cook County, Illinois was dismissed on the railroad's motion on the ground that the Circuit Court of Cook County "is an inconvenient and inappropriate forum". Filbrun did not appeal that determination. Instead he filed the United States District Court action and petitioner's motion for its transfer to the Western District of Michigan, Southern Division, pursuant to 28 U. S. C. A. § 1404(a) was denied by respondent.

Plaintiff selected the Circuit Court of Cook County, Illinois, in which to first file his personal injury suit against petitioner railroad, based on alleged injuries sustained by him at Ludington, Mason County, Michigan, which is about 60 miles from Grand Rapids, where a United States District Court sits. Respondent is a judge of the United States District Court which sits in Chicago, in Cook County, Illinois.

The jurisdiction of the district courts in federal employers' liability cases is concurrent with that of the state courts. 45 U. S. C. A. § 56.

On motion of defendant (petitioner here), the state court dismissed plaintiff's action on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and in- [fol. 98] appropriate forum. It also denied plaintiff's motion for reconsideration of its action. Plaintiff took no appeal from either order. Instead, plaintiff's suit on the same cause of action was filed in the same city and county of Illinois but in the United States District Court.

The dismissal in the Illinois state court was based upon the doctrine of *forum non conveniens*. Respondent was required by 28 U. S. C. A. § 1738 to give full faith and credit to the order entered by the state court. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F. 2d 868, 870. This is especially true because it is a court of concurrent jurisdiction in administering the Federal Employers' Liability Act, as provided in that act, *supra*. Certainly if plaintiff had refiled his action in any state court in Cook County, it would have been dismissed on the basis of the Circuit Court's dismissal.

In applying the doctrine of *forum non conveniens*, the state court, pursuant to Illinois law, applied all of the tests set forth in 28 U. S. C. A. § 1404(a), which are (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice. In applying that doctrine the state court was required additionally to determine whether plaintiff's selection of that court was dictated by a desire to vex and harass the petitioner. *Cotton* v. *L. & N. R. R. Co.*, 14 Ill. 2d 144, 166, 152 N. E. 2d 385, 396. While it made that additional finding, that fact is immaterial here because the district court did not have to wrestle with that question. Plaintiff was, however, bound by the doctrine of estoppel by verdict,[3] because, on all of the other tests applied by the state court, its decision was adverse to

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[3] In *Stangle* v. *Chicago, Rock Island and Pacific R. R. Co.*, 295 F. 2d 789, 791, we referred to a statement in regard to "estoppel by verdict" as announced in *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N. E. 2d 281, 285, as follows:

"• • • 'estoppel by verdict or judgment, is but another branch of the doctrine of *res judicata*, and rests on the same principles as *res judicata*' • • • ".

plaintiff. These matters were again raised before the district court under § 1404(a). Confronted by a final decision thereon by a court of concurrent jurisdiction, the district court had no discretion but to recognize the authoritative value of the state court's ruling, made in a case commenced there by plaintiff.

These reasons are sufficient upon which to grant the issuance of the writ requested. The transfer of this case to the federal district court 60 miles from plaintiff's home and [fol. 99] the scene of his accident, and where many of the witnesses are available to both litigants, all combine to establish that justice would there be accomplished.

The writ of mandamus will issue as prayed.

MANDAMUS GRANTED.

[fol. 100] CASTLE, *Circuit Judge*, dissenting.

I would deny the petition for mandamus. In my view of the matter the contested issues presented for determination are:

(1) Whether the state court's determination, made under the *forum non conveniens* doctrine, estops Filbrun from maintaining his action in a court sitting in Cook County, Illinois, and requires the District Court to allow the petitioner's motion to transfer the action to the Western District of Michigan, Southern Division; and if it does not,

(2) Whether, on the facts and circumstances presented, it is clearly established that the respondent's denial of the transfer sought constitutes an abuse of discretion.

The state court's determination was an application of the *forum non conveniens* doctrine. This required consideration of the same relevant factors as those to be considered in applying § 1404(a) (*Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32) plus an additional and more stringent factor required by the Illinois decision governing the doctrine's application to F. E. L. A. cases (*Cotton* v. *Louisville and Nashville Railroad Company*, 14 Ill. 2d 144, 174, 152 N. E. 2d

385) that "only where it is shown that plaintiff is motivated purely by vexation and harassment will an F. E. L. A. case be dismissed" thereunder. Petitioner urges that because the state court's determination required consideration of all factors relevant to an application of § 1404(a) every point and question necessary to be passed upon in connection with its motion to transfer has already been adjudicated adversely to Filbrun. From this premise petitioner argues that Filbrun is estopped from relitigating those matters and that the full faith and credit provisions of 28 U. S. C. A. § 1738 require respondent to allow petitioner's motion to transfer.

The flaw in petitioner's contentions is that although the factors relevant to consideration of a motion to transfer under § 1404(a)—matters bearing on the convenience of the parties and witnesses, and the interest of justice—are all also relevant areas of inquiry, consideration of which is pertinent and necessary to a determination of the applicability of the *forum non conveniens* doctrine, those factors [fol. 101] do not in the instant case involve identical material factual issues. Petitioner's contentions on this phase of the case confuse the ultimate conclusion and determination of the state court that it "is an inconvenient and inappropriate forum" with the material factual issues involved in that determination. A factual issue in the state court proceeding was whether the availability of a state forum at Ludington, Michigan (the county seat of Mason County) where the incident occurred, and where Filbrun and most of the witnesses resided,[1] as well as the availability of a federal forum at Grand Rapids, Michigan, within some sixty miles of Ludington, when considered in the light of all other pertinent factors established that Filbrun's selection of the

[1] Subsequent to the fall, and his treatment and discharge by Ludington medical practitioners, Filbrun was hospitalized in Chicago where a laminectomy and spinal fusion was performed by a Chicago doctor to remedy a ruptured intervertebral disc. This Chicago orthopedic specialist would be Filbrun's chief medical witness. In addition, the medical and hospital records concerning the hospitalization, diagnosis, treatment and surgery are all located at Chicago as well as the roentgenologist and hospital staff who participated therein. Petitioner's occurrence witnesses are its own employees.

Circuit Court of Cook County at Chicago, Illinois, some three hundred miles from Ludington, was dictated purely by a desire to vex and harass the petitioner. But in resolving the issues involved in the motion to transfer the District Court action to the District Court at Grand Rapids the availability of a state forum at Ludington was not a factor which the respondent could consider. He could transfer the cause to a federal district court only—and the issues before him involved only the comparative convenience or inconvenience, and interest of justice, as measured by a choice between the District Court at Chicago, Illinois, and the District Court at Grand Rapids, Michigan. Thus, at least one material factual consideration was not identical in both proceedings.

The cases relied upon by the petitioner are therefore inapposite. In *Healea* v. *Verne*, 343 Ill. 325, 175 N. E. 562; *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 103 N. E. 227 and *Hicks* v. *Hicks*, 20 Ill. App. 2d 139, 155 N. E. 2d 355, the estoppel recognized and applied, and in *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1 Cir., 284 F. 2d 868, the application of the mandate of 28 U. S. C. A. § 1738, was grounded on an [fol. 102] attempt to relitigate the same material fact or issue which had been the subject of a prior adjudication in an action or proceeding involving the parties.[2]

In the instant case the prior adjudication involved and required consideration of a material fact—the availability of a state court forum at Ludington—which was not subject to consideration in the subsequent proceeding. The test is not whether the same relevant factors or standards were applied in the determination of an issue but whether the same fact or question was determined. The question of the comparative convenience or appropriateness of the Ludington forum over a Chicago forum is not the same as the question of such relationship between a Grand Rapids forum[3] and a Chicago forum. In my opinion the determina-

[2] See also *Stangle* v. *Chicago, Rock Island and Pacific Railroad Company*, 7 Cir., 295 F. 2d 789, in which this Court approved an application of the doctrine of collateral estoppel.

[3] Except that petitioner is suable there, Grand Rapids has no connection with the action.

tion of the Circuit Court of Cook County does not estop Filbrun from maintaining his action in the United States District Court for the Northern District of Illinois, Eastern Division, a permissible venue under the Federal Employers' Liability Act (45 U. S. C. A. § 56), nor circumscribe the District Court in the exercise of its judgment and discretion in determining petitioner's motion to transfer the cause to Grand Rapids.

This Court recognizes the availability of mandamus as a remedy to rectify a district court's abuse of discretion in the application of § 1404(a). *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378; *Blaski* v. *Hoffman*, 7 Cir., 260 F. 2d 317. But as was pointed out by then Chief Judge, F. Ryan Duffy, "something more must be shown than an erroneous decision by the District Court. We emphasized that an abuse of discretion must clearly appear." *Sypert* v. *Miner*, 7 Cir., 266 F. 2d 196, 199, citing *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, 304.

I have considered the representations made, and reviewed the affidavits tendered with the pleadings, concerning the witnesses who would be called and the nature of the testimony each would give. Without discussing this and the other pertinent factors in detail I deem it sufficient to observe that the respondent's determination of the issues and disposition of the motion involved a balancing of the comparative convenience and inconvenience to the parties [fol. 103] and witnesses, and an appraisal of the likelihood of difficulty or expense in the procurement of attendance of witnesses, and the probability of need to resort to the use of depositions, as bearing on the interest of justice. Whether this Court would have reached the same conclusion is not important. In my opinion we cannot say that respondent has clearly abused the discretion he was called upon to exercise. Had it not been for the question of first impression precipitated by the estoppel and full faith and credit issues based on the state court determination, the petition for a writ of mandamus would have merited no more than the summary disposition called for by Judge Duffy's admonition in *Sypert* v. *Miner*, *supra* (p. 199), that:

"Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion."

[fol. 104]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, September 7, 1962

Before: Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. J. Earl Major, Circuit Judge.

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Virginia corporation, Petitioner,

vs.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

JUDGMENT GRANTING PETITION FOR MANDAMUS —September 7, 1962

This matter comes before the Court on the petition of The Chesapeake & Ohio Railway Company for a writ of mandamus, the answer of respondent thereto, including the

tion of the Circuit Court of Cook County does not estop Filbrun from maintaining his action in the United States District Court for the Northern District of Illinois, Eastern Division, a permissible venue under the Federal Employers' Liability Act (45 U. S. C. A. § 56), nor circumscribe the District Court in the exercise of its judgment and discretion in determining petitioner's motion to transfer the cause to Grand Rapids.

This Court recognizes the availability of mandamus as a remedy to rectify a district court's abuse of discretion in the application of § 1404(a). *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378; *Blaski* v. *Hoffman*, 7 Cir., 260 F. 2d 317. But as was pointed out by then Chief Judge, F. Ryan Duffy, "something more must be shown than an erroneous decision by the District Court. We emphasized that an abuse of discretion must clearly appear." *Sypert* v. *Miner*, 7 Cir., 266 F. 2d 196, 199, citing *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, 304.

I have considered the representations made, and reviewed the affidavits tendered with the pleadings, concerning the witnesses who would be called and the nature of the testimony each would give. Without discussing this and the other pertinent factors in detail I deem it sufficient to observe that the respondent's determination of the issues and disposition of the motion involved a balancing of the comparative convenience and inconvenience to the parties [fol. 103] and witnesses, and an appraisal of the likelihood of difficulty or expense in the procurement of attendance of witnesses, and the probability of need to resort to the use of depositions, as bearing on the interest of justice. Whether this Court would have reached the same conclusion is not important. In my opinion we cannot say that respondent has clearly abused the discretion he was called upon to exercise. Had it not been for the question of first impression precipitated by the estoppel and full faith and credit issues based on the state court determination, the petition for a writ of mandamus would have merited no more than the summary disposition called for by Judge Duffy's admonition in *Sypert* v. *Miner*, *supra* (p. 199), that:

"Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion."

[fol. 104]

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Chicago 10, Illinois

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Before: Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. J. Earl Major, Circuit Judge.

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THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

JUDGMENT GRANTING PETITION FOR MANDAMUS
—September 7, 1962

This matter comes before the Court on the petition of The Chesapeake & Ohio Railway Company for a writ of mandamus, the answer of respondent thereto, including the

exhibits attached to each, and the briefs and arguments of the respective parties; as well as the petition for rehearing, and respondent's answer thereto. It is therefore ordered that said petition for rehearing be granted.

On consideration whereof, it is ordered and adjudged by this Court that the opinion of this Court filed on June 27, 1962, and all orders entered pursuant thereto be vacated and set aside.

It is further ordered and adjudged by this Court that a writ of mandamus issue directing Honorable James B. Parsons, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to transfer, pursuant to the provisions of 28 U.S.C.A. §1404(a), the cause entitled *Jack J. Filbran* v. *The Chesapeake & Ohio Railway Company*, Civil No. 61 C 1174, from that Court to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan.

[fol. 105]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—October 4, 1962

It Is Ordered by the Court that the petition for rehearing filed by respondent herein be, and the same is hereby, denied.

[fol. 106]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER GRANTING STAY OF EXECUTION OF JUDGMENT GRANTING PETITION FOR MANDAMUS—October 23, 1962

This matter comes before the Court on the motion of counsel for the respondent to recall from the United States District Court for the Northern District of Illinois, Eastern Division, the certified copy of the final decree entered on September 7, 1962, and the certified copy of the order of October 4, 1962 denying respondent's petition for rehearing; and the Court having noted that on September 7, 1962, a judgment was entered directing the issuance of a writ of mandamus against respondent and that on October 4, 1962, respondent's petition for rehearing was denied;

It Is Hereby Ordered that the execution of this Court's judgment of mandamus entered on September 7, 1962, be stayed for a period of thirty (30) days from October 4, 1962, and if within such thirty (30) days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States certifying that a certiorari petition, record and brief have been filed, the stay shall continue until final disposition by the Supreme Court.

[fol. 107] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 108]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 7, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.